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THE

JUSTICE of the PEACE,

AND

PARISH OFFICER.

By RICHARD BURN, Clerk;

One of His Majesty's Justices of the Peace for the County of Westmorland.

The **Second Edition**, with the Statutes and adjudged Cases continued to the present Time.

In TWO VOLUMES.

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TO

Sir JAMES LOWTHER

OF

LOWTHER, Baronet,

THIS BOOK is humbly dedicated,

By the author,

RI. BURN.

THE PREFACE TO THE FIRST EDITION.

THE author propoſeth in this book to render the laws relating to the ſubjects it treats of, a little more intelligible than hath hitherto been done.

The method he makes uſe of is various.

The firſt thing regarded is the order of *time*. Thus in the Poor laws; firſt is ſet forth the appointment of *overſeers*; next the ſeveral branches of their duty, in finding *ſettlements* for the poor —— in *removing* them to ſuch ſettlements —— in making *rates* for their relief —— in *relieving* and otherwiſe ordering them —— and laſt of all, in *accounting* at the expiration of their office. —— Then again, in treating of *ſettlements*, it occurs, to conſider diſtinctly, and as near to the ſaid order as may be, ten different kinds of ſettlements —— by *birth* —— by the *parents* ſettlement —— by *apprenticeſhip* —— by *ſervice* —— by *marriage* —— by *inhabiting forty days after notice* —— by paying *pariſh rates* —— by ſerving a *pariſh office* —— by *renting* 10l. *a year* —— and by a perſon's *own eſtate*. —— In like manner, in treating of the *rates*, firſt is ſet forth the courſe of *laying*

the aſſeſſment —— then the *allowance* thereof by the juſtices —— *publiſhing* the ſame in the church —— *appeal* againſt the rates at the ſeſſions —— levying the ſame by *diſtreſs* —— and finally, *commitment* where no diſtreſs can be had.

Thus to exhibit another inſtance —— In the article of the *Woollen manufacture*, which makes up a conſiderable part of the juſtice of the peace his duty, and of the officers ſubordinate to him, there is ſuch a number and variety of ſtatutes, that authors are generally overwhelmed with them. To avoid which perplexity, the laws are here digeſted in order, according to the natural progreſs of that buſineſs; from the ſhearing of the ſheep, to the exportation of the wool manufactured; under the ſeveral heads of *winding of wool* by the ſhearer —— laws to prevent its *exportation* —— *working* of cloth —— *fulling* —— *meaſuring* —— *dying* —— *ſtretching* —— *dreſſing* —— *exporting*.

Where there is no priority in point of time; the next method is that of Lord *Coke*, to frame a definition which takes in the whole ſubject, and then explain the ſeveral parts of ſuch definition in their order. Thus *Grand larceny* is defined to be, *A felonious and fraudulent taking and carrying away by any perſon of the mere perſonal goods of another, above the value of* 12 d. In the handling of which, the ſeveral branches of the definition are explained in the order as they ſtand: *viz. A felonious and fraudulent taking* —— *and carrying away* —— *by any perſon* —— *of the mere perſonal goods* —— *of another* —— *above the value of* 12 d. Under which heads the general learning relating to that whole title is comprehended.

The

The like method is purſued in treating of the *commiſſion of the peace*, the form of an *indictment*, the form of an *order of removal*, and other articles.

In general, it is provided, that one thing ſhall clear the way for another, and the ſubſequent paragraphs explain the preceding.

Under the influence of which conduct, the author hath attempted to bring together under one general title, divers articles relating to the ſame ſubject, which in the common books are broken and detached under various ſeparate titles; hoping thereby, that what hath hitherto been thought introductory of confuſion, may tend to render the ſubject more perſpicuous, in exhibiting the whole under one comprehenſive view. Thus the laws relating to the *game*, which are above forty in number, and are interſperſed in the common books under about thirteen different titles, are here digeſted under one general title *Game*, to which the reader ſhall have recourſe for the knowledge of whatſoever belongeth to that ſubject. For example, if any perſon would be ſatisfied, what penalty the law hath provided for *tracing hares in the ſnow*; by recurring to the general title concerning the game, he will find the game diſtinguiſhed into three kinds, the *four footed* game, the *winged* game, and the game of *fiſh*: The *four footed* game, are diſtributed into the ſeveral ſpecies of *deer*, *hares*, and *conies*; under which head concerning *hares*, he will readily find what is deſired. In like manner, the *winged* game are ſubdivided into ſeveral branches, concerning *hawks* and *hawking* —— *ſwans* —— *partridges and pheaſants* —— *pigeons* —— *wild ducks*, *wild geeſe*, *and other water fowl* —— *grouſe or moor*

game —— *herons* —— and *other fowl*; each of which have their peculiar laws.

In theſe large comprehenſive titles, care is likewiſe taken, to be as particular as may be without injuring the connexion in the ſtatutes, by inſerting the whole law by it ſelf, relating to each ſeparate article. The benefit of which will appear by the following inſtance: If a perſon would know, what number of horſes or beaſts in a cart or waggon are allowed by the ſtatutes for the preſervation of the roads; let him take what treatiſe at preſent he pleaſes concerning the highways, he muſt read over the whole, before he ſhall be ſure that he hath found all which the law hath enacted concerning the ſame; and ſuch is often the inaccuracy and confuſion, that when he hath peruſed the whole, perhaps he may be ſtill to ſeek. For as to this inſtance before us, there have been regulations made concerning the ſame, by ten different acts of parliament, at very different times. Before he can have any competent knowledge thereof, he muſt lay all theſe ten acts together; and when he ſhall have done this, he will find amongſt them ſo many repeals, and revivals, and explanations, and amendments, that it will even then be no eaſy matter to conclude with certainty how the law doth ſtand as to that article. To ſpare the reader all which trouble, the author hath in this and all other the like inſtances, laid the whole law together relating thereunto, or at leaſt all that hath occurred to him, or which he hath thought it material to inſert. So that the reader may receive ſatisfaction in a very ſmall compaſs, as to what he ſhall be inquiring about, or at leaſt he may be ſatisfied in this, that if he doth not find it

there, he need not ſeek for it elſewhere in the book.

And by this method of bringing together into one general title, all thoſe ſeparate diſtinct titles, which have a mutual relation to and dependance upon each other, the author hath avoided one great inconvenience, of referring the reader from one title to another, and from that other back again to the firſt, and (which is not unuſual in books of the like kind) perhaps loſing the thing to be treated of betwixt them.

Upon which account alſo, where one law occurreth under two different titles, it is uſual with him to inſert the ſame under both thoſe titles; that ſo the reader's attention may not be interrupted, by ſending him to ſearch other titles, and from thoſe perhaps others again, which have no principal relation to the matter he hath in hand.

Alſo, upon another account, he hath ſometimes made uſe of more words than otherwiſe he would have done, namely, to avoid the frequent repetition of the term *&c.*; which is a vague expreſſion, and apt to create an uneaſineſs in the reader's mind, for that he cannot be ſatisfied from thence, how much, or how little is intended to be underſtood.

He hath alſo been ſomewhat large in the matter of *precedents* under divers titles; and hath endeavoured to bring them much nearer to the ſtatutes, upon which they ought to be formed, than uſually hath been done.

For all which enlargements, he hath the more ſpace allowed to him, for that he hath not thought it neceſſary (as others have done) to take up near one fourth part of the book,

by

by inſerting *Blackerby*'s juſtice at the end of it, by way of index; hoping that the method he hath purſued will render every thing of that kind impertinent and uſeleſs.

The materials which the author hath made uſe of, are chiefly of four kinds —— The *ſtatutes* at large —— the ſeveral treatiſes concerning the *pleas of the crown* —— the *reports* of caſes adjudged in the court of king's bench —— and the books concerning the *office of a juſtice of the peace*.

As to the *ſtatutes* at large, or acts of parliament; the author hath by no means thought himſelf at liberty, as Mr. *Dalton* and others have done, to deliver the import thereof in his own words; but hath conſtantly abridged the act, in the words of the act it ſelf, leaving out as little as poſſible which may ſeem any way material. And to each diſtinct clauſe, he hath annexed the interpretation thereof, where the ſame hath been determined in the court of king's bench, or expounded by other good authority.

The treatiſes concerning the *pleas of the crown*, are thoſe of *Stamford*, *Coke*, *Hale*, and *Hawkins*. Of the firſt of theſe, the author hath made little uſe, further than as he is adopted by the other three. As to which three great authorities, where the law hath been declared by Lord *Coke*, and not controverted by any other, nor altered ſince his time by any act of parliament, or judicial determination, the author hath given to him the preference. And where any of theſe differeth from the other, he hath noted the difference.

In citing of Mr. *Hawkins*, he hath not thought it allowable, as is uſual with others, to

to omit the ſeveral degrees of caution and aſſent, with which he delivereth his opinion; as, *it ſeemeth*, or *it hath been ſaid by ſome*, or *it ſeemeth to be the better opinion*, or *it ſeemeth to be agreed*, and the like; which are by no means arbitrary words without much meaning, but are inſerted by him with the utmoſt deliberation and judgment.

As to the books of *reports*; where the caſes therein have been conſidered by Mr. *Hawkins*, and the other learned perſons before mentioned, the author hath judged it very proper to leave the matter there, as ſettled by them. As to the reſt, he hath by no means thought himſelf of ability to proceed in Mr. *Hawkins*'s manner, by laying together all the reports on the ſame ſubject, and thereupon extracting an opinion out of the whole; but hath inſerted the ſame at large, or what he hath thought moſt material thereof, and left the determination thereupon to the reader's better judgment.

And here it may be requiſite, that the reader be admoniſhed, not to expect that the book ſhall be more perfect, than the materials of which it is compoſed. All the books of reports are not of equal authority. Some, as thoſe of *Keble*, *Salkeld*, Lord *Raymond*, and many others, are approved or allowed by the Judges: others, which are perhaps not of leſs internal authority, have not received that ſanction; ſuch, for inſtance, are thoſe of Lord *Coke*. During the greateſt part of his preſent Majeſty's reign, no authentick collection of reports hath been publiſhed, of caſes adjudged in matters relating to the ſubjects of this book. Herein the author could do no otherwiſe than make uſe of the materials he hath. Such are,

particularly,

particularly, *Andrew's reports*, and two volumes of *Sessions cases* published without the author's name. Of these it may be observed, that in the main they do agree very well with books of good authority, where they happen to report the same cases; and have no appearance of wilful falsification in cases not reported elsewhere. But for these, or any other, the author himself voucheth not: And, as he doth not add to their credit, so he doth not detract from it; but leaveth every author (as he needs must) to answer for himself. For he hath made it an invariable rule, upon all occasions, to cite his authorities, what such soever they be; and, in all material instances, in the very words of the original authors: that so, what may be of good authority in it self, shall not be rendred less so by his handling of it. And where no authority is alledged, he desires the reader will look upon it as such, namely, as having no authority; the same being nothing else but the author's own private observations, which are submitted to every reader's judgment, to approve or reject as he shall see cause.

The books of authority concerning the *office of a justice of the peace*, are those of *Fitzherbert*, *Crompton*, *Lambard*, and *Dalton*; the last of which was published in the reign of king *James* the first: since which time, no book under that title hath been allowed as sufficiently authentick. And even the additions which have been made to *Dalton* since his death, seem to have no better claim to an uncontrolable authority, than other collections which have not obtained it. And *Dalton* himself is much injured in the modern editions,

in

in like manner as was obſerved before of Mr. *Hawkins*, by delivering that as abſolute, which Mr. *Dalton* publiſhed under the ſeveral degrees of aſſent or doubtfulneſs before mentioned; and which the author, in juſtice to Mr. *Dalton*, hath reſtored.

Where *Dalton* hath adopted *Lambard*, *Crompton*, and *Fitzherbert* (which he doth moſt frequently in their own words) the author hath thought it ſufficient to cite *Dalton*'s ſingle authority. And generally, in all other caſes, where authors are agreed, he hath judged it unneceſſary to alledge more than one or two good vouchers.

Concerning the other books of this kind, which have been publiſhed ſince *Dalton*'s time, it is unneceſſary to enlarge; ſince of the moſt of them the author hath made no uſe, and of the reſt very ſparingly; and he will not ſeek to recommend his own book, by finding fault with others before him.

Orton, Weſtmorland,
Sep. 29. 1754.

ADVER-

ADVERTISMENT

Concerning this

SECOND EDITION.

THREE things herein the author hath chiefly attended to: 1. To continue the ſtatutes to this preſent time. 2. To authenticate divers caſes of ſlender authority, by the ſanction of Sir *John Strange*; whoſe reports of caſes adjudged during the reigns of his late and preſent majeſty, have ſupplied in ſome meaſure the deficiency which was in that part of the law before. 3. To take ſomewhat a larger ſcope in inveſtigating matters of antiquity; herein preſuming to differ from Lord *Coke* and other authorities of the law: being led therein by his learned and ingenious friend Dr. *Morton* of *Leiceſter-fields*; to whom upon the like account he expreſſed his acknowledgments in the poſtſcript to the former edition.

Sep. 29. 1755.

INTRO-

INTRODUCTION,

Consisting of Two Parts;

CONTAINING,

I. *Certain abbreviations made use of in this work.*

II. *Some general rules to be observed, in the construction of statutes, or acts of parliament.*

I. *Certain abbreviations made use of in this work.*

IN order to keep the book within a reasonable compass, the following *abbreviations* are made use of.

1. The word *justice* is always to be understood to mean *justice of the peace*, when not otherwise expressed. Justice.

2. The words *one justice* shall always be understood to signify *one or more justices:* so that what is directed to be done by one, shall not be intended thereby to exclude others from joining with him. One justice.

3. In like manner, *two justices*, when not otherwise expressed, shall be understood to signify *two justices or more.* Two justices.

4. So also a conviction on the oath of *one witness*, shall be understood to denote *one witness or more.* One witness.

5. And *two witnesses* shall denote *two or more witnesses.* Two witnesses.

6. (1 Q.) shall be understood to signify *one whereof is of the* Quorum. Quorum.

7. The *justices in sessions* shall signify the said justices, or *the major part of them.* Majority.

8. The word *sessions* shall denote *the general or quarter sessions*, if not otherwise expressed. Sessions.

9. The word *warrant* shall always signify *warrant under hand and seal*, where not expressed otherwise. Warrant.

10. Judges

Judge of assize.

10. Judges or Justices of *assize* shall be understood to signify also those of *Nisi Prius*, *Oyer and Terminer*, *and General Gaol Delivery*.

Mayor.

11. The word *mayor* shall always be understood to imply *bailiffs and other chief officers in corporations.*

Constable.

12. The word *constable* shall always be understood to imply *tythingmen*, *borsholders*, *headboroughs*, *and other peace officers of like degree.*

Overseer.

13. The word *overseer* shall be understood to mean *overseer of the poor*, where not expressed otherwise.

Poor.

14. Where a penalty, or part thereof, is expressed to be given to the *poor*; that shall be always understood to denote *the poor of the parish where the offence was committed*, if not otherwise limited.

Penalty.

15. Where a penalty is to be recovered before the justices of the peace, it is thought indispensible to insert particularly the manner of recovering the same; but where it is to be sued for in any of his majesty's courts of record at *Westminster*, it is judged not necessary to set forth the special method of procedure there: and generally, where it is expressed, that a person shall do, or not do such a thing, on pain of such a sum, without more, it shall be understood that such penalty is not recoverable before the justices of the peace, but only in the courts at *Westminster*.

Overplus.

16. In all cases of *distress and sale*, it shall be understood, that the *overplus* must be returned to the owner; after the sum or sums to be thereout deducted, shall be satisfied and paid.

Lands.

17. *Lands* shall be understood to stand for *lands*, *tenements*, *and hereditaments.*

Transportation.

18. Where *transportation* is directed for any offence, it shall always be understood, *that if the offender shall return before the time limited, he shall be guilty of felony without benefit of clergy.*

Blank spaces.

19. In the blank spaces for the names in the precedents, instead of inserting initial letters arbitrarily, it is thought it may be some small help to the memory, that *A. O.* shall signify the offender, *A. I.* the informer, *A. W.* the witness, *J. P.* the justice of the peace, and the like.

20. Also,

20. Alſo, for brevity ſake, ſums of money and other numbers are uſually expreſſed by figures, and not in words at length; but it is to be remembred, that in the forms of warrants, convictions, and other proceedings before the juſtices, they ought to be expreſſed in words at length, and not in figures. Figures.

21. Where a ſtatute is ſaid to be in force, until ſuch a day, month, and year, *&c.* it ſhall always be underſtood to impiy, *and from thence to the end of the then next ſeſſion of parliament.* Continuance of ſtatutes.

22. In the ſtatutes made in the reign of the late King *William*, it is thought not neceſſary upon all occaſions to ſay *William the Third*, ſince there are no printed ſtatutes in the reigns of *William the Firſt and Second.* Citing of ſtatutes.

Nor is it thought neceſſary in ſuch ſtatutes to add the name of Queen *Mary* to that of King *William*; but it is judged ſufficient for the underſtanding thereof, to quote the ſtatutes in this manner; *viz.*

1 *W. Seſſ.* 2. *c.* 6. *ſ.* 3. to ſignify the ſtatute made in the parliament holden in the firſt year of the reign of King *William* the third and Queen *Mary*, the ſecond ſeſſion thereof, chapter the ſixth, ſection the third.

Abbreviations in the names of books cited as authorities, or otherwiſe occaſionally noted, conſiſting for the moſt part of ſome of the initial letters of the authors names, and other common diſtinctions, need not to be further explained.

II. *Some general rules to be obſerved, in the conſtruction of ſtatutes, or acts of parliament.*

To avoid repeating the ſame obſervations ſome hundreds of times, it is thought proper to premiſe the following general rules to be obſerved, in the conſtruction of ſtatutes or acts of parliament.

1. Regularly, a ſtatute in the affirmative doth not repeal a precedent affirmative ſtatute. 11 *Co.* 61. How far an affirmative repealeth an affirmative.

But if the latter is contrary to the former, it amounteth to a repeal of the former. L. *Raym.* 160.

How far an affirmative ſtatute altereth the common law.

2. A ſtatute made in the affirmative, without any negative expreſſed or implied, doth not take away the common law; and therefore the party may waive his benefit by ſuch ſtatute, and take his remedy by the common law. 2 *Inſt.* 200.

Repealing a repealing ſtatute.

3. By repealing of a repealing ſtatute, the firſt ſtatute is revived. *Read. Parl.*

Special power to be purſued.

4. Regularly, where an act of parliament giveth a power or intereſt to one perſon certain, by this expreſs deſignation of one, all others are excluded. 11 *Co.* 59, 64.

Power to adminiſter an oath.

5. In all caſes, where juſtices may take examinations, or other accuſation or proof, tho' the ſtatute doth not expreſly ſet down that it ſhall be upon oath, yet it ſhall be intended that it ſhall be upon oath. *Dalt. c.* 115.

In what caſe the ſeſſions may execute the power given to two juſtices.

6. Generally, it is holden, that where a ſtatute appoints a thing to be done by one or more juſtices, without giving any appeal to the ſeſſions; there the juſtices in ſeſſions may do that thing: but where an appeal is given to the ſeſſions, the juſtices in ſeſſions cannot proceed originally therein, becauſe that method would take away the power of appealing.

How far an indictment will lie where another method of proſecution is appointed.

7. Where a ſtatute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding againſt the offender, as by commitment, or action of debt, or information, without mentioning an indictment; it ſeems to be ſettled at this day, that it will not maintain an indictment, becauſe the mentioning the other methods of proceeding only, ſeems impliedly to exclude that of indictment: Yet it hath been adjudged, that if ſuch a ſtatute give a recovery by action of debt, bill, plaint, information, *or otherwiſe*, it authorizes a proceeding by way of indictment. 2 *Haw.* 211.

Where no method of proſecution is appointed.

8. But every contempt of a ſtatute is indictable, where no other puniſhment is limited. 1 *Haw.* 60.

Where the defendant may be proſecuted both by the king, and the party grieved.

9. And wherefoever an act of parliament doth generally prohibit any thing, the party grieved ſhall not only have his action for his private relief, but the

the offender ſhall be puniſhed at the king's ſuit, for the contempt of the law. 2 *Inſt.* 163.

10. All actions, indictments, or informations, on penal ſtatutes, for any forfeiture limited to the king, ſhall be brought within two years after the offence committed; if limited to the king and proſecutor, then within one year; and if it is not ſued for in that one year, then the king may ſue for the ſame within two years, after the expiration of that one year; and not otherwiſe. 31 *El. c.* 5. *ſ.* 5. That is to ſay, unleſs where it is otherwiſe directed by ſubſequent ſtatutes.

In what time proſecutions ſhall be on penal ſtatutes.

11. Many ancient ſtatutes are penned in the form of charters, ordinances, commands, or prohibitions from the king, without mentioning the concurrence of either lords or commons; yet inaſmuch as they have always been acquieſced in as unqueſtionably authentick, this eſtabliſhes and confirms their authority, and the defect is ſalved by ſuch univerſal reception. *Hawkins's preface to the ſtatutes.*

Statutes not in the name of the whole legiſlature.

12. The preamble or rehearſal of a ſtatute is deemed true; and therefore good arguments may be drawn from the preamble. 1 *Inſt.* 11.

Preamble.

13. Where a ſtatute directs the doing of a thing, for the ſake of juſtice, or the publick good; the word *may* is the ſame as the word *ſhall:* as where the ſtatute of the 14 *C.* 2. *c.* 12. enacts that the overſeers may make a rate to reimburſe the conſtables, this is conſtrued they *ſhall*; for they are compellable ſo to do. 2 *Salk.* 609.

May do ſuch a thing, how to be underſtood.

14. Where a ſtatute directs a penalty to be recovered *in any court of record*; this ſhall not be intended of the quarter ſeſſions, unleſs it be ſpecially named in ſuch ſtatute; but only of the courts of record at *Weſtminſter.* 6 *Co.* 19, 20. 2 *Hale's Hiſt.* 29, 30.

Court of record.

15. It is a general rule in the conſtruction of ſtatutes, that where things of an inferior degree are firſt mentioned, thoſe of a higher dignity ſhall not be included under general ſubſequent words; as where a ſtature ſpeaks of indictments to be taken before juſtices of the peace, or *others having power to take in-*

Higher courts not intended, where the inferior are firſt mentioned.

dictments, it ſhall be underſtood only of other inferior courts, and not of the king's bench, or other courts at *Weſtminſter*. 2 *Co.* 46. 2 *Haw.* 305.

Power to convene the parties.

16. Where a ſtatute gives power to the juſtices, to require any perſon to do a thing, as to take the oaths, the law implicitly gives them power to make a warrant to have the body before them; for when the law granteth any thing to any one, that alſo is granted, without which the thing it ſelf cannot be: And it is againſt the office of the juſtices, and the authority given them by the law, that they ſhall go and ſeek the parties. 12 *Co.* 130, 131.

Neceſſity of ſummoning the party.

17. Where a ſtatute gives power to the juſtices of the peace, to hear and determine an offence in a ſummary way; it is neceſſarily implied, and ſuppoſed, as a part of natural juſtice, that the party be firſt cited, and have opportunity to be heard and anſwer for himſelf. 1 *Haw.* 154.

Two juſtices to be both together.

18. Where an act of parliament gives power to two juſtices finally to hear and determine an offence, it is neceſſarily ſuppoſed, that they ſhall be both together, or, which is the ſame thing in other words, that they ſhall hold a ſpecial ſeſſions for that purpoſe. And the like is, when they are to do any other judicial act, as to make an order of baſtardy, or adjudge the ſettlement of a poor perſon. For it is unknown to the laws of *England*, that two perſons ſhall act as judges in the ſame cauſe, when at the ſame time one of them is in one part of the county, and the other in another.

Informer's oath.

19. Where a ſtatute appoints a conviction to be on the *oath of one witneſs*; this ought not to be by the ſingle oath of the informer; for if the ſame perſon ſhould be allowed to be both proſecutor and witneſs, it would induce profligate perſons to commit perjury, for the ſake of the reward. L. *Raym.* 1545.

Confeſſion.

20. Where a ſtatute directeth, that a perſon ſhall be convicted of an offence, upon the *oath of one or more witneſſes*, and ſaith nothing of the *confeſſion* of the party; yet if the offender ſhall before the juſtice confeſs the offence, he may be convicted upon ſuch confeſſion: for confeſſion is ſtronger evidence than

than the oath of witneſſes. *Dalt.* 109, 162. *Str.* 546.

21. Where an act of parliament gives power to the juſtices of the peace, to take order in any matter, *according to their diſcretions*; this ſhall be underſtood, according to the rules of reaſon, law, and juſtice, and not by private opinion. 5 *Co.* 100. Diſcretionary power.

22. In all caſes where *the kingdom of* England, or *that part of* Great Britain *called* England, hath been or ſhall be mentioned in any act of parliament; the ſame ſhall be deemed to comprehend *the dominion of* Wales, *and town of* Berwick upon Tweed. 20 *G.* 2. *c.* 42. *ſ.* 1. England includes Wales.

23. By the articles of the Union, 5 *An. c.* 8. All parts of the united kingdoms of *England* and *Scotland*, ſhall be under the ſame regulations as to trade: So that where any act, in relation to trade, before the 5 *An.* mentions the kingdom of *England*, the ſame ſhall be underſtood to extend to the whole united kingdom. How far Scotland is included.

24. It may be laid down as an invariable rule, that *the law favours liberty*: So that in the conſtruction of a penal ſtatute, where the interpretation is dubious, that ſenſe muſt be purſued (all other things being equal) which is more beneficial to the ſubject, or the party ſuffering. Thus, where an directs, that the juſtices ſhall commit an offender to priſon for 12 *months*, the juſtices may not alter the words, and commit him for *a year*; for in this reſpect, 12 months and one year are not the ſame; but the months muſt be computed at 28 days to the month, and not as Kalendar months, unleſs it be ſo expreſſed in the act. Twelve months.

25. In all caſes wherein, by any act of parliament, an oath ſhall be allowed or required; the ſolemn affirmation of quakers ſhall be allowed inſtead of ſuch oath, altho' no particular or expreſs proviſion be made for that purpoſe in the ſaid act. 22 *G.* 2. *c.* 46. *ſ.* 36. Quakers affirmation.

26. To ſay that a perſon ſhall *forfeit* generally, or that he ſhall *forfeit to the king*, is all one; for the king ſhall have every forfeiture not otherwiſe limited. 11 *Co.* 60. Forfeiture.

27. Where a ſtatute ſaith, that ſuch a perſon ſhall pay *fine and ranſom* to the king; in legal underſtand- Fine and ranſom.

ing, ſuch fine and ranſom are all one: for if they were divers, then ſhould the party pay two ſums, one for the fine, and another for the ranſom; which was never done. 1 *Inſt.* 127.

At the king's pleaſure.

28. Acts of parliament that ſpeak of fines or ranſoms *at the king's pleaſure*, are always to be underſtood of the king in his courts by his juſtices. 1 *H. H.* 375.

Where a power of commitment is implied.

29. It is ſaid, that wherefoever a juſtice of the peace is impowered, by any ſtatute, to bind a perſon over, or to cauſe him to do a certain thing, and ſuch perſon being in his preſence ſhall refuſe to be bound, or to do ſuch thing; the juſtice may commit him to the gaol, to remain there till he ſhall comply. 2 *Haw.* 116.

Impriſonment, when.

30. When a ſtatute appoints impriſonment, but limits no time when; it ſhall be immediately. 8 *Co.* 119.

Impriſonment, how long.

31. When a ſtatute appoints impriſonment, but limits no time how long; the priſoner in ſuch caſe muſt remain at the diſcretion of the court. *Dalt.* 410.

Commitment to the houſe of correction, for what time.

32. Where any offender ſhall by a juſtice of the peace be committed to the houſe of correction, for an offence cognizable before him out of ſeſſions, and the time and manner of puniſhment is not by law expreſly limited; he may commit him to the houſe of correction, *there to be kept to hard labour, until the next general or quarter ſeſſions, or until diſcharged by due courſe of law.* 17 G. 2. c. 5. ſ. 34.

Statute making an offence felony.

33. Wherever a ſtatute makes any offence *felony*; it incidentally gives it all the properties of felony at common law. 1 *Haw.* 105.

Miſpriſion.

34. Therefore an act of parliament that makes an offence felony, doth conſequently introduce the puniſhment of concealing, that is, miſpriſion of felony; and every offence made felony by act of parliament, includeth miſpriſion. 1 *H. H.* 708.

Infants.

35. An act making a new felony, extendeth not to infants under 14 years of age; but if they be of that age, it binds them. 1 *H. H.* 706.

Life and member.

36. Not only thoſe crimes which are made felonies by the expreſs words of any ſtatute, but alſo

thoſe

those which are decreed to have or undergo *judgment of life and member*, do become felonies thereby, whether the word felony were mentioned or not. 1 *Haw.* 107.

37. But an offence shall never be made felony, by the construction of any doubtful and ambiguous words of a statute; and therefore if it be only prohibited under pain of *forfeiting body and goods*, or of being *at the king's will for body, lands, and goods*, it shall amount unto no more than a high misdemeanor, punishable by imprisonment, or the like. 1 *Haw.* 107. Body and goods.

38. All felonies by the common law have the benefit of clergy; therefore where a statute enacts a felony, and says, the offender shall *suffer death*, clergy lies notwithstanding, and is never ousted without express words. 3 *Inst.* 73. 2 *Haw.* 342. Benefit of clergy.

39. Saving of *dower* in a statute making an offence felony, is superfluous; for by the 1 *Ed.* 6. *c.* 12. Dower is not lost by the felony of the husband. *s.* 17. Forfeiture of dower.

40. Where a penalty is given to an informer upon a penal statute; he shall have no *costs*, unless the statute it self directs it, but he shall pay his costs out of the penalty. 2 *Haw.* 274. Costs.

Therefore where a justice hath power to inflict a pecuniary penalty, not exceeding such a sum; he may do well in such penalty to consider the costs of prosecution.

41. No *damages* can be given to the party grieved, upon an indictment, or any other criminal prosecution; and where by statute damages are given to the party grieved, it seems that they cannot be recovered on an indictment at the suit of the king, grounded on such statute, unless such method of recovering them be expresly given by the statute; but that they ought to be sued for in an action on the statute, in the name of the party grieved. But it is every day's practice in the court of king's bench, to induce defendants to make satisfaction to prosecutors, for the costs of the prosecution, and also for the damages sustained, by intimating an inclination on that account to mitigate the fine due to the king. 2 *Haw.* 210 Damages.

42. Where

Treble damages.

42. Where a ſtatute gives *treble damages*; the juſtices are not to aſſeſs the damages, and then treble them; but the jury ought to find the damages, and then the juſtices are to treble them. *Cro. Car.* 449.

Diſtreſs and ſale.

43. In all caſes where a juſtice is or ſhall be required by any act of parliament, to iſſue a warrant of diſtreſs for the levying of any penalty inflicted, or any ſum of money directed to be paid by ſuch act; it ſhall be lawful for ſuch juſtice granting ſuch warrant, therein to order and direct the goods and chattels ſo to be diſtrained, to be ſold and diſpoſed of within a certain time to be limited in ſuch warrant, ſo as ſuch time be not leſs than 4 days, nor more than 8 days, unleſs ſuch penalty or ſum of money, together with reaſonable charges of taking and keeping the diſtreſs, be ſooner paid. And the officer making ſuch diſtreſs, may deduct the reaſonable charges of taking, keeping, and ſelling ſuch diſtreſs, out of the money ariſing by ſuch ſale; and the overplus (if any) after ſuch charges, and alſo the ſaid penalty or ſum of money, ſhall be ſatisfied and paid, ſhall be returned on demand to the owner of the goods and chattels ſo diſtrained. (Except only in caſes of diſtreſs for quakers tithes and church rates.) 27 *G.* 2. *c.* 20.

Second offence.

44. An act inflicting a penalty for a *ſecond offence*, muſt always be underſtood, after conviction and judgment for the firſt offence; and the ſecond offence muſt be committed after the firſt conviction, and judgment thereupon given; for it doth not appear to be an offence, until judgment by proceeding of law be given againſt the offender. 2 *Inſt.* 468.

And the indictment for a ſecond offence, muſt recite the record of the firſt conviction; and upon the evidence, the record of the firſt conviction muſt be proved: but the matter of the firſt conviction ſhall never be re-examined, but muſt ſtand for granted. 1 *H. H.* 686.

Abjuration Oath. See Oaths.

Accessary.

I. Of accessaries in general.
II. Of accessaries before the fact.
III. Of accessaries after the fact.
IV. How they are to be proceeded against.

I. Of accessaries in general.

1. ACCESSARY *(quasi accedens ad culpam)* is he that is not the chief actor, but one that is concerned in the felony by commandment, aid, or receipt. *Wood* 663. Accessary, what.

2. In the highest capital offence, namely, high treason, there are no accessaries, neither before nor after; for the consenters, aiders, abetters, and knowing receivers and comforters of traytors, are all principals. 1 *Hale's Hist.* 613. In the highest offence, no accessaries.

But yet as to the course of proceeding, it hath been, and indeed ought to be the course, that those who did actually commit the very fact of treason, should be first tried, before those that are principals in the second degree; because otherwise this inconvenience might follow, that the principals in the second degree might be convicted, and yet the principals in the first degree may be acquitted, which would be absurd. 1 *H. H.* 613.

3. In cases that are criminal, but not capital, as in *petit larceny* and *trespass*, there are no accessaries; for the accessaries *before* are in the same degree as principals; and accessaries *after*, by receiving the offenders, cannot be in law under any penalties as accessaries, unless the acts of parliament that induce those penalties do expressly extend to receivers or comforters, as some do. 1 *H. H.* 613. In the lowest offences, no accessaries.

4. It remains therefore, that the business of this title of accessaries refers only to *felonies*, whether by the common law, or by act of parliament. 1 *H. H.* 613. Accessaries only in felony.

5. Concerning which, Lord *Coke* observes generally, that when any offence is felony, either by the common law, or by statute, all accessaries both before and after are incidently included. 3 *Inst.* 59. Accessaries implied in felony.

6 But as to felonies by act of parliament, Lord *Hale* distinguishes thereupon as follows: Regularly (he says) if an act of parliament enact an offence to be felony, tho' it mention nothing of accessaries before or after, yet virtually and consequentially those Accessaries in felonies by statute.

that counsel or command the offence, are accessaries before, and those that knowingly receive the offender are accessaries after. 1 *H. H.* 613.

But if the act of parliament that makes the felony, in express terms comprehend accessaries before, and make no mention of accessaries after, namely, receivers or comforters, there it seems there can be no accessaries after; for the expression of procurers, counsellors, or abetters, all which import accessaries before, make it evident, that the law-makers did not intend to include accessaries after, which is an offence of a lower degree than accessaries before. 1 *H. H.* 614.

And altho' it be generally true, that an act of parliament creating a felony, renders consequentially accessaries before and after within the same penalty, yet the special penning of the act of parliament in such cases, sometimes varies the case: Thus the statute of 3 *H.* 7. *c.* 2. for taking away women, makes the offender, and the procuring and abetting, yea and wittingly receiving also, to be all equally *principal* felonies, and excluded of clergy. Again, the statute of 27 *Eliz. c.* 2. makes the coming in of a jesuit *treason*, the receiving or relieving of him *felony*, the contributing of money to his relief a *præmunire*. So that acts of parliament may diversify the offences of accessary or principal, according to the various penning thereof, and so have done in many cases. 1 *H. H.* 614, 615.

How far accessaries by statute shall have their clergy.

7. Also a statute excluding the principals from the benefit of clergy, doth not thereby exclude the accessaries before or after; neither doth a statute, excluding the accessaries, thereby exclude the principals. 2 *Haw.* 342.

II. Of accessaries before the fact.

Accessary before.

An accessary before the fact committed, is he that being absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony.

Being absent at the time of the felony committed] For if he is present, he is not an accessary, but a principal.

So also, if divers come to commit an unlawful act, and be present at the time of the felony committed, tho' one of them only doth it, they are *all* principals. *Hale's Pl.* 215.

So if one present move the other to strike; or if one present did nothing, but yet came to assist the party if needful; or if one hold the party while the felon strikes him; or if one present deliver his weapon to the other that strikes; for they are *present*, aiding, abetting, or comforting. *id.* 216.

But if one came casually, not of the confederacy, tho' he hindred not the felony, he is neither principal nor accessary, altho' he apprehend not the felon; but for his negligence he is punishable by fine and imprisonment. *Hale's Pl.* 216. 2 *Haw.* 313.

Also in some cases, even a person absent may be principal; as he that puts poison into any thing to poison another, and leaves it, tho' not present when it is taken: And so it seems all that are

preſent when the poiſon is ſo infuſed, and conſenting thereunto. *Hale's Pl.* 216.

Procure, counſel, command, or abet] But here note ſome diververſities: As,

(1.) *When the principal doth not accompliſh the fact altogether in the ſame ſort, as it was before hand agreed between him and the acceſſary.* And therefore if one command another to lay hold upon a third perſon, and he lays hold upon him and robs him, the perſon commanding is not acceſſary to the robbery; for his command might have been performed without any robbery. *Dalt. c.* 161.

But if the command had been to beat him, and the party commanded doth kill him, or beat him ſo that he dieth thereof; the perſon commanding ſhall be acceſſary to the murder: for it is a hazard in beating a man, that he may die thereof. *Dalt. c.* 161.

(2.) *He that commandeth or counſelleth any evil or unlawful act to be done, ſhall be adjudged acceſſary to all that ſhall enſue upon the ſame evil act, but not to any other diſtinct thing.* As if one command another to ſteal a horſe, and he ſtealeth an ox; or to rob a man by the highway of his money, and he robs him in his houſe of his plate; or to burn ſuch an one's houſe, and he burneth the houſe of another: Theſe are other acts and felonies than he commanded to be done, and therefore he ſhall not be adjudged acceſſary to them. *Dalt. c.* 161.

(3.) *But if a perſon commit the ſame felony, which another did command or counſel to be done, tho' he doth it at another time, or in another place, or in another ſort than was commanded or counſelled, yet here ſuch perſon commanding or counſelling ſhall be acceſſary.* As if he doth counſel to kill a man by poiſon, and he kills him with a dagger; or to kill him by the highway, and he kills him in his houſe; or to kill him one day, and he kills him on another day; in theſe and the like caſes, he ſhall be acceſſary. *Dalt. c.* 161.

(4.) *Thoſe offences which in the conſtruction of law are ſudden and unpremeditated, cannot have any acceſſaries before.* As killing a man by miſadventure, in his own defence, or manſlaughter: For in ſuch caſe there can be no procuring, counſelling, commanding, or abetting. But there may be acceſſaries after. 1 *H. H.* 616.

(5.) It ſeems to be generally agreed, that *he who barely conceals a felony, which he knows to be intended, is guilty only of a miſpriſion of felony, and ſhall not be judged an acceſſary*; for this is not procuring, counſelling, or abetting. 2 *Haw.* 317.

(6.) Alſo, if a man counſels or commands another to kill a perſon, and before he hath killed him, he who counſelled or commanded it, repents, and *countermands* it, charging him not to kill him, and yet after he doth kill him; here ſuch perſon countermanding ſhall not be adjudged acceſſary to the murder: For the law adjudgeth no man acceſſary to a felony before the fact, but ſuch as continue in that mind at the time that the felony is done and executed. *Dalt. c.* 161.

(7.) But if a perſon adviſe a woman to kill her child as ſoon as it ſhall be born, and ſhe kill it in purſuance of ſuch advice; he is an acceſſary to the murder, tho' at the time of the advice, the child not being born, no murder could be committed of it: For

the influence of the felonious advice contiuuing till the child was born, makes the adviser as much a felon, as if he had given his advice after the birth. 2 *Haw.* 315.

III. Of accessaries after the fact.

Accessary after.

Accessary after the fact is, where a person knowing the felony to be committed by another, relieves, comforts, or assists the felon. 1 H. H. 618.

Knowing the felony to be committed] There can be no doubt, but that it is necessary that the receiver have notice of the felony, either express or implied, and so to be laid in the indictment, that the receiver *knew* that the person received by him, had committed the principal felony. 2 *Haw.* 319.

The felony] This, as hath been said, holds place only in *felonies*, and in those felonies, where by the law judgment of death regularly ought to insue; and therefore not in petit larceny. 1 *H. H.* 618.

And therefore if a person do barely receive, comfort, or conceal an offender guilty of any common trespass, or inferior crime of the like nature, tho' he know him to have been guilty, and that there is a warrant out against him, yet he is not an accessary to the offence; but perhaps in such case he may be indictable for a contempt of the law, in hindring the due course of justice. 2 *Haw.* 311.

Relieves, comforts, or assists the felon] In the explication of these words, several things are considerable;

(1.) Generally, any assistance whatsoever given to one known to be a felon, in order to hinder his being apprehended, or tried, or suffering the punishment to which he is condemned, is sufficient to bring a man within this description, and make him accessary to the felony; as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape. 2 *Haw.* 317.

(2.) But if a man knows that a person hath committed a felony, but doth not discover it, this doth not make him an accessary, but it is a misprision of felony, for which he may be indicted, and upon his conviction fined and imprisoned. 1 *H. H.* 618.

(3.) Also if a man sees another commit a felony, but consents not, nor yet takes care to apprehend him or to levy hue and cry after him, or upon hue and cry levied doth not pursue him; this is a neglect punishable by fine and imprisonment, but it doth not make him an accessary. 1 *H. H.* 618.

(4.) In like manner, if one commit a felony, and come to a person's house before he be arrested, and such person suffer him to escape without arrest, knowing him to have committed a felony, this doth not make him accessary; but if he take money of the felon to suffer him to escape, this makes him accessary: And so it is if he shut the fore door of his house, whereby the pursuers are deceived, and the felon hath opportunity to escape, this makes him an accessary; for here is not a bare omission, but an act done by him to accommodate the felon's escape. 1 *H. H.* 619.

(5.) Also

(5.) Also it seems to be settled at this day, that whosoever rescues a felon from an arrest for the felony, or voluntarily suffers him to escape, is an accessary to the felony. 2 *Haw.* 318.

(6.) But if a felon be in prison; he that relieves him with necessary meat, drink, or cloaths, for the sustentation of life, is not accessary. 1 *H. H.* 620.

(7.) So if he be bailed out; it is lawful to relieve and maintain him, for he is still in some sort in custody, and is under a certainty of coming to his trial. 1 *H. H.* 620.

(8.) But if a felon be in gaol; for a man to convey instruments to him to break prison to make an escape, or to bribe the gaoler to let him escape, makes the party an accessary; for tho' common humanity allows every man to afford such persons necessary relief, yet common justice prohibits all unlawful attempts to cause their escapes. 1 *H. H.* 621.

(9.) The sending a letter in favour of a felon, or advising to labour witnesses not to appear, makes no accessary; but it is a high contempt. *Hale's Pl.* 219.

(10.) A man may be accessary to an accessary, by the receiving of him, knowing him to be an accessary to felony. 1 *H. H.* 622.

(11.) If a man hath goods stolen, and he receives his goods again, simply, without any contract to favour the felon in his prosecution, this is lawful; but if he receive them upon agreement not to prosecute, or to prosecute faintly, this is theftbote, punishable by imprisonment and ransom, but yet it makes him not an accessary; but if he take money of him to favour him, whereby he escapes, this makes him accessary. 1 *H. H.* 619.

(12.) And if any person shall receive or buy stolen goods, knowing them to be stolen; or shall receive, harbour, or conceal the thieves; he shall be deemed an accessary, and be transported for fourteen years. 3 *W. c.* 9. *s.* 4. 5 *Ann. c.* 31. *s.* 5. 4 *Geo. c.* 11. And buying the goods at an undervalue, is a presumptive evidence, that he knew they were stolen. 1 *H. H.* 619.

(13.) It seems agreed, that the law hath such a regard to that duty, love, and tenderness, which a wife owes to her husband, as not to make her an accessary to felony by any receipt given to her husband; yet if she be any way guilty of procuring her husband to commit it, it seems to make her an accessary before the fact, in the same manner as if she had been sole. Also it seems agreed, that no other relation, besides that of a wife to her husband, will exempt the receiver of a felon from being an accessary to the felony; from whence it follows, that if a master receive a servant, or a servant a master, or a brother a brother, or even a husband a wife, they are accessaries in the same manner as if they had been mere strangers to one another. 2 *Haw.* 320.

(14.) But if the wife alone, the husband being ignorant of it, do receive any other person being a felon; the wife is accessary, and not the husband. 1 *H. H.* 621.

(15.) But if the husband and wife both receive a felon knowingly, it shall be judged only the act of the husband, and the wife shall be acquitted. 1 *H. H.* 621.

IV. How they are to be proceeded against.

Accessaries how far bailable.

1. By 3 *Ed.* 1. *c.* 15. Those who are *accused of the receipt of felons, or of commandment, or of force, or of aid of felony done, shall be bailable*; but this seemeth to be only where it stands indifferent whether the party be guilty or innocent; for if there are strong presumptions of guilt, it seemeth that he is not bailable. 2 *Haw.* 102.

In what county to be tried.

2. Where a person is feloniously stricken or poisoned in one county, and dies thereof in another county, the accessary may be indicted in the county where the death shall happen. 2 & 3 *Ed.* 6. *c.* 24. *s.* 2, 3.

The same.

3. Where a murder or felony shall be committed in one county, and a person shall be accessary in another county, the accessary may be indicted in the county where he was accessary: And the judges of assize, or two of them, of the county where the offence of the accessary shall be committed, on suit to them made, shall write to the keeper of the records where the principal shall be convicted, to certify them whether such principal be attainted, convicted, or otherwise discharged; which he shall certify under his seal. 2 & 3 *Ed.* 6. *c.* 24. *s.* 4.

Accessary and principal in the same indictment.

4. The accessary may be indicted in the same indictment with the principal, and that is the best and most usual way; but he may be indicted in another indictment, but then such indictment must contain the certainty and kind of the principal felony. 1 *H. H.* 623.

Principal to be first tried.

5. It seemeth that the accessary may be put to answer before the principal hath appeared; but his plea cannot be tried before such appearance, unless he desires it himself; but if he will put himself upon his trial, before the principal be tried, he may; and his acquittal or conviction, upon such trial, is good. 2 *Haw.* 322. 1 *H. H.* 623.

But it seemeth necessary in such case to respite judgment, till the principal be convicted; for if the principal be after acquitted, that conviction of the accessary is annulled, and no judgment ought to be given against him: But if he be acquitted of the accessary, that acquittal is good, and he shall be discharged. 1 *H. H.* 623, 624.

Both tried by one inquest.

6. It seems to be settled at this day, that if the principal and accessary appear together, and the principal plead the general issue, the accessary shall be put to plead also; and that if he likewise plead the general issue, both may be tried by one inquest; but that the principal must be first convicted; and that the jury shall be charged, that if they find the principal not guilty, they shall find the accessary not guilty. But it seems agreed, that if the principal plead a plea in bar, or abatement, or a former acquittal, the accessary shall not be forced to answer, till that plea be determined; for if it be found for the principal, the accessary is discharged; if against the principal, yet he shall after plead over to the felony, and may be acquitted. 2 *Haw.* 323. 1 *H. H.* 624.

7. An-

7. Anciently, the accessary could not be tried, unless the principal were *attainted* (3 *Ed.* 1. *c.* 14.) but by the 1 *Ann. Stat.* 2. *c.* 9. *s.* 1. If the principal be convicted, or stand mute, or peremptorily challenge above twenty of the jury, the accessary may be tried and punished as if the principal had been attainted; and this, altho' the principal be admitted to his clergy, pardoned, or otherwise delivered before attainder.

Accessary may be tried, tho' the principal be not attainted.

8. But in the case of stolen goods, if the principal cannot be taken, the buyer or receiver may be prosecuted as for a misdemeanor, to be punished by fine and imprisonment, or other such corporal punishment as the court shall think fit, altho' the principal be not convicted; which shall exempt the offender from being punished as accessary, if the principal be afterwards taken and convicted. 1 *Ann. Stat.* 2 *c.* 9. *s.* 2. 5 *Ann. c.* 31. *s.* 6.

Receiver of stolen goods may be tried before the principal.

9. It seemeth not reasonable, where a person is charged as accessary to more than one principal, to try him on the conviction of one, before all of them have appeared; because hereby he may be subject to the harship and hazard of two trials for his life for the same offence, which is contrary to the general course of the law. 2 *Haw.* 323.

Case where a person is charged as accessary to more than one.

10. If the principal be erroneously attaint, yet the accessary shall be put to answer, and shall not take advantage of the error in that attainder; but the principal reversing the attainder, reverseth the attainder of the accessary. 1 *H. H.* 625.

Case where the principal is erroneously attainted.

11. If one person be indicted as principal, and another as accessary, and both be acquit; yet the person indicted as accessary may be indicted as principal, and the former acquittal as accessary is no bar. 1 *H. H.* 625.

Accessary acquitted may be indicted as principal.

12. But if a person be indicted as principal and acquitted; he shall not be indicted as accessary before: And if he be, he may plead his former acquittal in bar, for it is in substance the same offence. 1 *H. H.* 626.

Principal acquitted may not be indicted as accessary before.

13. But if he be indicted as principal, and acquitted; he may be indicted as accessary after, for they are offences of several natures. 1 *H. H.* 626.

Principal acquitted may be indicted as accessary after.

14. And so it is, if he be indicted as accessary before, and acquitted; yet for the same reason he may be indicted as accessary after. 1 *H. H.* 626.

Accessary before, acquitted, may be indicted as accessary afte

Indictment of an accessary before the fact, taken from *Coke*'s report of Lord *Sanchar*'s case, 9 *Co.* 117. which, as the prosecution was by the king's special command, was probably drawn by good advice; and on which *Robert Creighton*, esquire, (Lord *Sanchar* of *Scotland*) was convicted and hanged; *viz.*

Middlesex. THE *jurors do present for the lord the king upon their oath, That whereas* Robert Carliel *late of* London, *yeoman, and* James Irweng *late of* London *aforesaid, yeoman, not having god before their eyes, but seduced by the instigation of the devil, the eleventh day of* May *in the year of the reign of our lord* James *by the grace of god of* England, France, *and* Ireland, *king, defender of the faith, and so forth, the tenth; and of* Scotland *the forty-fifth, at* London, *that is to say, in the parish of St.* Dunstan *in the West, and in the ward of* Farringdon without London *aforesaid, &c. with force and arms, &c. feloniously and of their aforethought malice, in and upon one* John Turner *then and there in the peace of god and of the said lord the king being, made an assault and affray, and the aforesaid* Robert Carliel *a certain gun* [tormentum] *called a pistol, of the value of* 5 s. *then and there charged with gunpowder and a leaden bullet, which gun the said* Robert Carliel *in his right hand then and there had and held; in and upon the aforesaid* John Turner *then and there feloniously, voluntarily, and of his malice forethought, did shoot off and discharge; and the aforesaid* Robert Carliel, *with the leaden bullet aforesaid from the gun aforesaid then and there shot and discharged, the aforesaid* John Turner *in and upon the left part of the breast of him the said* John Turner, *near the left pap of him the said* John Turner, *then and there feloniously struck, giving to the said* John Turner *then and there with the leaden bullet aforesaid out of the gun aforesaid then and there shot off and discharged, in and upon the left part of the breast of him the said* John Turner, *one mortal wound of the breadth of half an inch, and depth of five inches, of which mortal wound the aforesaid* John Turner *at* London *aforesaid, in the parish and ward aforesaid, instantly died: And that* James Irweng *feloniously, and of his forethought malice, then and there was present, aiding, assisting, abetting, comforting and maintaining the aforesaid* Robert Carliel *to the felony and murder aforesaid in form aforesaid to be done and committed; and so the aforesaid* Robert Carliel *and* James Irweng *the aforesaid* John Turner *at* London *aforesaid, in the parish and ward aforesaid, in manner and form aforesaid, feloniously, voluntarily, and of their forethought malice, killed and murdered, against the peace of the lord the now king, his crown and dignity;* And that one *Robert Creighton*, late of the parish of St. *Margaret* in *Westminster* in the county of *Middlesex*, esquire, not having god before his eyes, but being seduced by the instigation of the devil, before the felony and murder aforesaid by the aforesaid *Robert Carliel*

liel and *James Irweng* in manner and form aforesaid done and committed, that is to say, the tenth day of *May* in the year of the reign of our lord *James*, by the grace of god of *England*, *France*, and *Ireland*, king, defender of the faith, and so forth, the tenth, and of *Scotland* the forty fifth, the aforesaid *Robert Carliel*, at the aforesaid parish of St. *Margaret* in *Westminster* aforesaid, in the county of *Middlesex* aforesaid, to the felony and murder aforesaid, in manner and form aforesaid to be done and committed, maliciously, feloniously, voluntarily and of his forethought, malice, did incite, move, abet, counsel and procure; against the peace of the said lord the king that now is, his crown and dignity.

If after the fact, then the form may be thus;

And that A. O. *late of* ——— *in the county of* ——— *yeoman, well knowing the said (offender) to have done and committed the said felony in manner and form aforesaid, afterwards, to wit, on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *at* ——— *aforesaid in the county aforesaid, with force and arms, him the said* ——— *did then and there feloniously, and of his malice forethought, receive, aid, and comfort; against the peace of the said lord the king that now is, his crown and dignity.*

Action popular. See **Information.**

Adultery. See **Lewdness.**

Addition.

TO prevent the inconvenience of troubling one person for another, it is enacted by 1 *H.* 5. *c.* 5. that *in every original writ of actions personal, appeals, and indictments, in which the exigent shall be awarded, to the names of the defendants additions shall be made, of their estate or degree or mistery, and of the towns, or hamlets, or places, and counties, of the which they were, or be: And if by process upon the said original writs, appeals, or indictments, in the which the said additions be omitted, any outlawries be pronounced, they shall be void; and before the outlawries pronounced, the said writs and indictments shall be abated by the exception of the party.*

In which the exigent shall be awarded] The *exigent* is a writ whereby the sheriff is commanded to proclaim the party in the county court, in order to his being outlawed. And by these words the act extendeth only to cases where process of outlawry may be awarded; and therefore it extendeth not to an indictment, for incroaching on a highway, because in that case process of outlawry lieth not, but a distress. *Croke Eliz.* 148.

To

To the names of the defendants] Regularly by the common law, every natural man, having no name of dignity, ought to be named in all originals and other ſuits by his chriſtian name and ſirname, and that, before this act, ſufficed; but if he had a name of inferior dignity (as knight, or banneret) he ought to be named by his chriſtian name and ſirname, and by the addition of his name of dignity. 2 *Inſt.* 666.

If there be a corporation of one ſole perſon, that hath a fee ſimple, and may have a writ of right, he may be named by the common law by his chriſtian name without any ſirname, as *John* Biſhop of *P.* 2 *Inſt.* 666.

If it be a corporation aggregate of many able perſons, as mayor and commonalty, dean and chapter, the mayor or dean need not be named by his chriſtian name, becauſe that ſuch a corporation ſtandeth in lieu both of the chriſtian name and ſirname. 2 *Inſt.* 666.

A duke, marquiſs, earl, viſcount, or baron might by the common law be named by his chriſtian name, and by the name of his dignity; as *John* Duke of *M.* 2 *Inſt.* 666.

Additions ſhall be made] The addition as well of the eſtate, degree, or miſtery, as the town, hamlet, or place, ought by force of this act to be alledged in the firſt name; for an addition after the *alias dictus* is ill: As for inſtance, where the indictment was againſt *W. R.* otherwiſe called *W. R.* of *H.* for without the *alias dictus* there is no addition of the vill; and if the party is not ſufficiently named in the firſt part, the *alias* cannot aid or help it. 2 *Inſt.* 669. 3 *Salk.* 20.

Where there are ſeveral defendants of different names, and the ſame addition, it is ſafeſt to repeat the addition after each of their names, applying it particularly to every one of them. 2 *Haw.* 187.

Where a father hath the ſame name and the ſame addition with a defendant being his ſon, the action is abateable unleſs it add the addition of *the younger* to the other additions; but where the father is the defendant, it is ſaid that there is no need of the addition of *the elder*. 2 *Haw.* 187.

Of their eſtate or degree] Eſquire is a good addition; and the ſons of all peers and lords of parliament in the life of their fathers, are in law eſquires, and ſo to be named. Alſo the eldeſt ſon of a knight is an eſquire. 2 *Inſt.* 667.

And it ſeems clear, that no one can be well deſcribed by the addition of a temporal dignity of any other nation beſides our own; becauſe no ſuch dignity can give a man a higher title here, than that of an eſquire. 2 *Haw.* 187.

Gentleman and gentlewoman are good additions; and if a gentlewoman be named ſpinſter, ſhe may abate and quaſh the writ or indictment. 2 *Inſt.* 668.

A gentleman by reputation, that is neither gentle by birth, nor by office, nor by creation, but commonly called gentleman, and known by that name, is a ſufficient addition; but if he be named yeoman, he cannot quaſh the indictment. 2 *Inſt.* 668.

Lord

Lord *Coke* ſays, he that hath taken any degree in either of the univerſities, may be named by that degree without queſtion. 2 *Inſt.* 668. But this is doubted by others. 2 *Haw.* 187.

Clerk is a good addition of a clergyman. 2 *Inſt.* 668.

Yeoman and labourer are good additions, and are applied only to the man, and not to the woman. 2 *Haw.* 188.

Widow or ſinglewoman, or (as ſome ſay) wife of ſuch a one, are all of them good additions of the eſtate and degree of a woman; but no ſuch like addition is good, for the eſtate and degree of a man. And ſpinſter is a good addition for the eſtate and degree of a woman, and perhaps alſo for that of a man. 2 *Haw.* 188.

Or miſtery] This includeth all lawful arts, trades, and occupations, as taylor, merchant, mercer, pariſh clerk, ſchoolmaſter, huſbandman, labourer, and the like 2 *Haw.* 188.

But ſervant, groom, or farmer, are not additions within this act, becauſe they are not of any miſtery. And chamberer, butler, pantler, or the like, are additions of offices, and not of any miſtery or occupation. 2 *Inſt.* 668.

Neither doth this act extend to unlawful practices, as extortioner, maintainer, thief, vagabond, heretick, and ſuch like. 2 *Haw.* 188.

If a man have divers arts, trades, or occupations, he may be named by any of them; but if a gentleman by birth be a tradeſman, he ſhall not be named by his trade, but by the degree of gentleman, becauſe it is worthier than the addition of any miſtery. And in general a man ſhall be named by his worthieſt title of addition. 2 *Inſt.* 668, 669.

And of the towns or hamlets] If there be two towns in a county of the ſame principal name, with different additions to diſtinguiſh them from one another, as *Great Dale* and *Little Dale*, or *Upper Dale* and *Lower Dale*, and the defendant be named only of the principal town without any addition, as of *Dale* only, the defendant may plead that there are two *Dales* in the ſame county, and none without an addition. But if there be two towns of the ſame name in a county, without any addition to diſtinguiſh them, it may be ſufficient in ſuch caſe to name the defendant generally of either of ſuch towns, without adding any thing to diſtinguiſh it from the other. 2 *Haw.* 189.

If the defendant live in a hamlet of a town, it is ſaid to be in the election of the party to name him either of the hamlet or of the town. 2 *Haw.* 189.

But the addition of a pariſh, if there be two or more towns in it, is not good; but if there be but one town, the addition of pariſh is good. 2 *Inſt* 669.

The addition of the place of habitation of a wife, is ſufficiently ſhewn, by ſhewing that of the huſband; becauſe it ſhall be intended that the wife lives where the huſband does. 2 *Haw.* 190.

Or places] If the defendant lives in a place known by a ſpecial name, and lying out of any town or hamlet, he may be well named of ſuch place; but if he live in any place known within a town

town or hamlet, it is said to be safest to name him of the town or hamlet. 2 *Haw.* 189, 190.

Of the which they were, or be] The addition of the estate, degree, or mistery, ought to be as the defendant was of at the day of the indictment brought, and not *late* of such a degree or mistery; but it is a good addition to name the defendant *late* of such a town or place, because men do often remove their habitation. 2 *Inst.* 670.

Shall be void] This being a judgment in law, is interpreted to be made void by a writ of error, or by the plea of the party coming in upon a *capias utlagatum*; for tho' the statute saith they shall be void, yet they are but voidable by a writ of error or plea. 2 *Inst.* 670.

By the exception of the party] But if the defendant appeareth upon process, and plead, taking no advantage thereof by exception, he hath lost the benefit hereof: But it seemeth that the bare appearance of the party, without plea, doth not salve the want of a good addition. 2 *Haw.* 190.

Advertisement. See Stamps.

Affray.

I. What is an affray.
II. How far it may be suppressed by a private person.
III. How far by a constable.
IV. How far by a justice of the peace.
V. Punishment of an affray.

I. What is an affray.

1. AN *affray is a publick offence to the terror of the king's subjects, and is an* English *word, and so called, because it affrighteth and maketh men afraid.* 3 Inst. 158.

2. From whence it seemeth clearly to follow, that there may be an *assault*, which will not amount to an *affray*; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned, in which case it cannot be said to be to the terror of the people. 1 *Haw.* 134.

3. Also it is said, that no quarrelsome or threatning words whatsoever, shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth, that the constable may, at the request of the party threatned, carry the person who threatens to beat him, before a justice in order to find sureties. 1 *Haw.* 135.

4. Also,

4. Alſo, it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the meſſenger of ſuch a challenge; or even barely to endeavour to provoke another to ſend a challenge, or to fight; as by diſperſing letters to that purpoſe, full of reflections, and inſinuating a deſire to fight. 1 *Haw.* 135.

5. But altho' no bare words, in the judgment of law, carry in them ſo much terror as to amount to an affray, yet it ſeems certain, that in ſome caſes there may be an affray, where there is no actual violence; as where a man arms himſelf with dangerous and unuſual weapons, in ſuch a manner as will naturally cauſe a terror to the people; which is ſaid to have been always an offence at the common law, and is ſtrictly prohibited by ſtatute: For by 2 *Ed.* 3. *c.* 3. it is enacted, that *no man of what condition ſoever, except the king's ſervants in his preſence, and his miniſters in executing their office, and ſuch as be in their company aſſiſting them, and alſo upon a cry made for arms to keep the peace, ſhall come before the king's juſtices, or other of the king's miniſters doing their office, with force and arms, nor bring any force in affray of peace, nor go nor ride armed, by night or day, in fairs or markets, or in the preſence of the king's juſtices, or other miniſters, or elſewhere; upon pain to forfeit their armour to the king, and their bodies to priſon at the king's pleaſure. And the king's juſtices in their preſence, ſheriffs and other miniſters in their bailiwicks, lords of franchiſes and their bailiffs in the ſame, and mayors and bailiffs of cities and boroughs within the ſame, and borough-holders, conſtables, and wardens of the peace within their wards, ſhall have power to execute this act. And the judges of aſſize may puniſh ſuch officers as have not done their duty herein.*

Upon a cry made for arms to keep the peace] It is holden upon theſe words of exception, that no perſon is within the intention of this ſtatute, who arms himſelf to ſuppreſs dangerous rioters, rebels, or enemies, and endeavours to ſuppreſs or reſiſt ſuch diſturbers of the peace and quiet of the realm. 1 *Haw.* 136.

In affray of peace] *En effrayer de la pees*; Lord *Coke* has it *pais*, of the country, or the people; and ſo, he obſerves, that the writ grounded upon this ſtatute ſaith, In quorundam *de populo* terrorem; and therefore the printed book, *in affray of peace*, ought to be amended. 3 *Inſt.* 158.

And it is holden upon theſe words, that no wearing of arms is within the meaning of this ſtatute, unleſs it be accompanied with ſuch circumſtances as are apt to terrify the people; from whence it ſeems clearly to follow, that perſons of quality are in no danger of offending againſt this ſtatute, by wearing common weapons, or having their uſual number of attendants with them, for their ornament or defence, in ſuch places, and upon ſuch occaſions, in which it is the common faſhion to make uſe of them, without cauſing the leaſt ſuſpicion of an intention to commit any act of violence, or diſturbance of the peace. 1 *Haw.* 136.

Nor to go nor ride armed] It is holden, that a man cannot excuſe the wearing ſuch armour in publick, by alledging that ſuch a one threatned him, and that he wears it for the ſafety of his perſon from his aſſault; but it hath been reſolved, that no one ſhall incur the penalty of the ſaid ſtatute for aſſembling his neighbours and friends in his own houſe, againſt thoſe who threaten to do him any violence therein, becauſe a man's houſe is his caſtle. 1 *Haw.* 136.

Their bodies to priſon] The ſtatute of 20 *R.* 2. *c.* 1. adds a fine likewiſe.

Wardens of the peace] It is holden, that any juſtice of the peace, or other perſon who is impowered to execute this ſtatute, may proceed thereon *ex officio*; and if he find any perſon in arms, contrary to the form of the ſtatute, he may ſeize the arms, and commit the offender to priſon; and that he ought alſo to make a record of the whole proceeding, and certify the ſame into the exchequer. 1 *Haw.* 135.

II. How far it may be ſuppreſſed by a private perſon.

1. It ſeems agreed, that any one who ſees others fighting, may lawfully part them, and alſo ſtay them till the heat be over, and then deliver them to the conſtable to be carried before a juſtice, to find ſureties for the peace. 1 *Haw.* 136.

2. And the law doth encourage him hereunto; for if he receives any harm by the affrayers, he ſhall have his remedy by law againſt them; and if the affrayers receive hurt, by the endeavouring only to part them, the ſtanders-by may juſtify the ſame, and the affrayers have no remedy by law. 3 *Inſt.* 158.

3. But if either of the parties be ſlain, or wounded, or ſo ſtricken that he falleth down for dead; in that caſe the ſtanders-by ought to apprehend the party ſo ſlaying, wounding, or ſtriking, or to endeavour the ſame by hue and cry; or elſe for his eſcape they ſhall be fined and impriſoned. 3 *Inſt.* 158.

III. How far by a conſtable.

1. It ſeems agreed, that a conſtable is not only impowered, as all private perſons are, to part an affray which happens in his preſence; but is alſo bound at his peril to uſe his beſt endeavours to this purpoſe; and not only to do his utmoſt himſelf, but alſo to demand the aſſiſtance of others, which if they refuſe to give him, they are puniſhable with fine and impriſonment. 1 *Haw.* 137.

2. And it is ſaid, that if a conſtable ſee perſons either actually engaged in an affray, as by ſtriking or offering to ſtrike, or drawing their weapons, or the like; or upon the very point of entering upon an affray, as where one ſhall threaten to kill, wound, or beat another, he may either carry the offender before a juſtice, to find ſureties for the peace, or he may impriſon him of his own authority for a reaſonable time, till the heat ſhall be over, and alſo afterwards detain him till he find ſuch ſurety by obligation: But

But it ſeems, that he has no power to impriſon ſuch an offender in any other manner, or for any other purpoſe; for he cannot juſtify the committing an affrayer to gaol, till he ſhall be puniſhed for his offence: And it is ſaid, that he ought not to lay hands on thoſe, who barely contend with hot words, without any threats of perſonal hurt; and that all which he can do in ſuch caſe, is to command them under pain of impriſonment to avoid fighting. 1 *Haw.* 137.

3. But he is ſo far intruſted with a power over all actual affrays, that tho' he himſelf is a ſufferer by them, and therefore liable to be objected againſt, as likely to be partial in his own cauſe, yet he may ſuppreſs them; and therefore, if an aſſault be made upon him, he may not only defend himſelf, but alſo impriſon the offender, in the ſame manner as if he were no way a party. 1 *Haw.* 137.

4. And if an affray be in an houſe, the conſtable may break open the doors to preſerve the peace; and if affrayers fly to an houſe, and he follow with freſh ſuit, he may break open the doors to take them. 1 *Haw.* 137.

5. But it is ſaid, that a conſtable hath no power to arreſt a man for an affray done out of his own view, without a warrant from a juſtice, unleſs a felony were done, or likely to be done; for it is the proper buſineſs of a conſtable to preſerve the peace, and not to puniſh the breach of it. 1 *Haw.* 137.

IV. How far by a juſtice of the peace.

There is no doubt, but that he may and muſt do all ſuch things to that purpoſe, which a private man or conſtable are either enabled or required by the law to do: But it is ſaid, that he cannot without a warrant authorize the arreſt of any perſon for an affray out of his own view; yet it ſeems clear, that in ſuch caſe he may make his warrant to bring the offender before him, in order to compel him to find ſureties for the peace. 1 *Haw.* 137.

V. Puniſhment of an affray.

All affrays in general are puniſhable by fine and impriſonment. 1 *Haw.* 138.

And they are inquirable in the leet, as common nuſances. 3 *Inſt.* 158.

Warrant to apprehend affrayers.

Weſtmorland. { To the conſtable of——

WHEREAS A. I. *of*——*yeoman, hath this day made oath before me* J. P. *eſquire, one of his majeſty's juſtices of the peace for the ſaid county, that on the*——*day of*——*in the*——*year of the reign of*——A. O. *of*——*yeoman, and* B. O. *of*——*yeoman, at*——*in the ſaid county, in a tumultuous man-*

ner

ner made an affray, wherein the person of the said A. I. *was beaten and abused by them the said* A. O. *and* B. O. *without any lawful or sufficient provocation given to them, or to either of them, by him the said* A. I. *These are therefore to command you forthwith to apprehend the said* A. O. *and* B. O. *and bring them before me, or some other of his said majesty's justices of the peace for the said county, to answer the premisses, and to find sureties as well for their personal appearance at the next general quarter-sessions of the peace to be holden for the said county, then and there to answer to an indictment to be preferred against them by the said* A. I. *for the said offence, as also for their keeping the peace in the mean time, towards his said majesty and all his liege people, and especially towards him the said* A. I. *Hereof fail not, as you will answer the contrary at your peril. Given under my hand and seal at ——— in the said county, the ——— day of,* &c.

Indictment for an affray.

THE *jurors for our lord the king, upon their oath present, that* A. O. *of ——— in the county of ——— taylor, and* B. O. *of ——— in the said county, blacksmith, with force and arms, on the ——— day of ——— in the ——— year of the reign of our sovereign lord* George *the second, by the grace of god, of* Great Britain, France, *and* Ireland, *king, defender of the faith, and so forth, at ——— aforesaid in the county aforesaid, being arrayed and unlawfully assembled together in a warlike manner, did make an affray, to the terror and disturbance of divers of the subjects of our said sovereign lord the king then and there being, and to the evil example of all other the subjects of our said sovereign lord the king, and against the peace of our said lord the king, his crown and dignity.*

Alamodes. See Silks.

Ale and Beer. See Excise.

Alehouses.

For matters relating to the *excise* of beer and ale, see title Excise.

I. Concerning inns and alehouses in general.
II. Selling ale without licence.
III. Licensing alehouses.
IV. Recognizance, and forfeiture thereof.
V. To what places the licence shall extend.
VI. How long the licence shall continue in force.
VII. Offences in brewing of ale.
VIII. Innkeepers obliged to receive guests.
IX. Soldiers quartered in alehouses.
X. Concerning ale vessels, and the measure of ale.
XI. Conspiring to enhance the price of ale.
XII. Selling in vessels of plate.
XIII. Innkeeper suffering tipling.
XIV. Persons guilty of tipling.
XV. Concerning drunkenness.
XVI. Detaining goods for the reckoning.
XVII. Goods of a guest stolen out of an inn.
XVIII. Guests stealing goods.

I. Concerning inns and alehouses in general.

1. EVERY inn is not an alehouse, nor is every alehouse an inn: but if an inn uses common selling of ale, it is then also an alehouse; and if an alehouse lodges and entertains travellers, it is also an inn. Difference between inns and alehouses.

2. It was resolved by all the judges, that any person might erect an inn to lodge travellers, without any licence or allowance for such erection. *Dalt. c.* 56. *Black.* 170. Licence to erect inns.

3. But it seems to be agreed, that the keeper of an inn may by the common law be indicted and fined, as being guilty of a publick nusance, if he usually harbour thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hindrance of other ancient and well governed inns, or keep it in a place in respect of its situation wholly unfit for such a purpose. 1 *Haw.* 225. Inn indictable.

Innkeeper selling ale.

4. And if an inn useth the trade of an alehouse, as almost all innkeepers do, it shall be within the statutes made about alehouses. *Dalt.* 133. *Black.* 170.

Inn to be licensed.

5. It hath been also agreed for law, that innkeepers ought to have licence, and be bound by recognizance for keeping good order, as alehousekeepers are. *Dalt.* 24.

Power of justices by the commission.

6. By the commission of the peace, two justices (1 *Q.*) may inquire of innholders, and of all and singular other persons, who shall offend in the abuse of weights or measures, or in the sale of victuals, against the form of the ordinances in that behalf made.

II. Selling ale without licence.

Here are three methods of proceeding against an offender, (1) by the justices in sessions, (2) by two justices out of sessions, and (3) by one justice out of sessions.

By the justices in sessions.

1. By the justices in sessions:—*The justices of the peace, or two of them at the least* (1 Q.) *shall have full power and authority, to remove, discharge, and put away common selling of ale and beer in common alehouses and tipling houses, in such towns and places where they shall think meet and convenient.* 5 & 6 Ed. 6. c. 25. s. 1.

But this must be understood of houses unlicensed only. 1 *Salk.* 46.

And by this clause the justices in their sessions have power to suppress such unlicensed alehouses, and need not proceed by information or conviction; but they have thereby a discretionary power to suppress them, without shewing any cause or misdemeanor. *L. Ray.* 1303.

And here it is to be observed, that there is a difference between suppressing an unlicensed alehouse, and one that is licensed. Where an alehouse is licensed, the justices, to suppress it, must either proceed upon the recognizance, the condition whereof must at least be broken; and therefore his having another trade, or being a bailiff, can be no cause in such case: or by indictment, and then there must be such disorders as prove a nusance. But where an alehouse is unlicensed, the justices may suppress it at discretion; for on the denial of a licence no appeal lies, and this statute which gives the justices a power to suppress *where they shall think convenient*, would signify nothing if it did not extend to such cases; for it cannot extend to alehouses that are licensed, because they are not punishable without a breach of the recognizance. And as to those that are unlicensed, if they be suppressed, the want of a licence can only come in question in such case, and not the reason and cause why it was denied. 1 *Salk.* 45, 46.

By two justices out of sessions.

2. Next, by two justices out of the sessions:—If any person unlicensed, shall obstinately, and upon his own authority, take upon him to keep a common alehouse or tipling house, or shall contrary to the commandment of the said justices, or two of them, use commonly selling of ale and beer (except in fairs); the said justices or two of them (1 *Q.*) shall for every such offence commit

mit every ſuch perſon ſo offending to the common gaol, there to remain without bail or mainprize for three days:

And before his deliverance, the ſaid juſtices ſhall take recognizance of him, with two ſureties, that he ſhall not keep any common alehouſe or tipling houſe, or uſe commonly ſelling of ale or beer, as by the diſcretion of the ſaid juſtices ſhall ſeem convenient:

And the ſaid juſtices ſhall make certificate of every ſuch recognizance and offence, at the next quarter ſeſſions; which certificate ſhall be a ſufficient conviction of the ſame offence:

And the juſtices, upon the ſaid certificate made, ſhall in open ſeſſions aſſeſs the fine for every ſuch offence at 20 *s.* 5 & 6 *Ed.* 6. *c.* 25. *ſ.* 4, 5.

3. Next, as to the method of proceeding by one juſtice: This may be either by the ſtatute of the 3 *C.* *c.* 3. or by the ſtatute of the 26 *G.* 2. *c.* 31. By one juſtice, on the 3 C. c. 3.

The method of proceeding on the 3 *C.* *c.* 3. is as follows: If any perſon ſhall, upon his own authority, not being thereunto lawfully licenſed, take upon him to keep a common alehouſe or tipling houſe, or uſe commonly ſelling of ale or beer, cyder or perry (except in fairs); he ſhall for the firſt offence forfeit 20 *s.* to the poor; the ſame offence being viewed by any mayor or juſtice, or confeſſed by the offender, or proved by the oath of two witneſſes: To be levied by the conſtables or churchwardens by warrant of diſtreſs; and for default of ſatisfaction in three days, the diſtreſs to be appraiſed and ſold, rendring the overplus: And if he have not ſufficient goods whereon to levy, or ſhall not pay the 20 *s.* in ſix days after conviction, ſuch mayor or juſtice ſhall commit him to the conſtable or other inferior officer, where the offence ſhall be committed, or the party apprehended, to be openly whipped for the ſaid offence, as the ſaid juſtice ſhall appoint: And if the conſtable, or other inferior officer, ſhall neglect to execute the ſaid precept or warrant, or do refuſe, or do not execute the puniſhment by himſelf or ſome other; the ſaid mayor or juſtice may commit him to the common gaol, till the offender ſhall be puniſhed and whipped by himſelf or ſome by his procurement, or until he hath paid the ſum of 40 *s.* to the poor for his contempt. For the ſecond offence, the ſaid mayor or juſtice ſhall commit ſuch perſon keeping an alehouſe without licence, to the houſe of correction, for one month, and to be dealt with as an idle, lewd, and diſorderly perſon. And if he ſhall again offend, he ſhall, on conviction as aforeſaid, be committed in like manner to the houſe of correction, there to remain until by the order of the juſtices in ſeſſions he ſhall be delivered from thence. But he ſhall not be puniſhed both upon this act, and upon the 5 & 6 *Ed.* 6. but upon one of them only.

The other method of proceeding by one juſtice, is on the ſtatute of the 26 *Geo.* 2. *c.* 31. and is as follows: By one juſtice, on the 26 G. 2. c. 31.

Where any juſtice ſhall ſuſpect that any perſon ſells without licence, he may call him before him, and alſo any exciſe officer or gauger to produce his ſtock book or other account of the charge or ſurvey of ſuch ſuſpected perſon, and may examine ſuch officer

on oath in what manner he charges ſuch perſon, and how ſuch perſon pays the duties; and if it ſhall appear by ſuch ſtock book or account, or oath of the officer, that ſuch perſon is ſurveyed as a victualler or retailer, and is charged with the ſame duties that victuallers and retailers are charged with and pay for any the liquors aforeſaid, and is not intitled to the allowance or abatement given to common brewers, he ſhall be deemed an alehouſekeeper, victualler, retailer, or ſeller thereof, as if it had been proved by two witneſſes. *ſ.* 9.

And if any perſon ſhall make information before one juſtice, and ſhew probable cauſe that he ſuſpects that any perſon ſells without licence, the juſtice may call him before him (A), and ſummon any other perſon as evidence; and if the perſon ſummoned refuſe to appear, or appear and refuſe to give evidence upon oath, he ſhall forfeit 10*l.* by diſtreſs, by warrant of ſuch juſtice, to be paid to the overſeers for the uſe of the poor where the offender lives. *ſ.* 10.

And every perſon ſo convicted (B) of ſelling without licence, ſhall for the firſt offence forfeit 40*s.* for the ſecond offence 4*l.* and for the third and every other offence 6*l.* by diſtreſs, by warrant of the juſtice convicting the offender (C), half to the informer, and half to the poor; and if no ſufficient diſtreſs ſhall be found, the juſtice ſhall commit him (D) to the gaol or houſe of correction, for one month, for the firſt offence; for two months, for the ſecond; and for the third, until he ſhall be diſcharged by order of ſeſſions. 26 *G.* 2. *c.* 31. *ſ.* 12. 28 *G.* 2. *c.* 19. *ſ.* 2.

And any perſon may be a witneſs in ſuch caſe, notwithſtanding he pays to the poor of any place where the offence ſhall be committed. 26 *G.* 2. *c.* 31. *ſ.* 17.

But perſons puniſhed by this act ſhall not be puniſhed by any former act; and perſons puniſhed by any former act, ſhall not be puniſhed by this act. *ſ.* 14.

Penalty of ſelling ale to a perſon unlicenſed.

4. By the ſtatute of the 4 *J.* *c.* 4. If any perſon ſhall ſell or deliver any beer or ale, to any perſon that ſhall then ſell beer or ale as a common tipler or alehouſekeeper, the ſame perſon not having licence to ſell ale or beer (except it be for the uſe of his houſhold only); he ſhall forfeit for every barrel 6*s.* 8*d.* and ſo proportionably for other quantities; half to the poor, and half to him that ſhall ſue in ſeſſions, by action of debt, information, indictment, or preſentment.

III. Licenſing alehouſes.

By two juſtices at a general meeting.

1. By the 5 & 6 *Ed.* 6. *c.* 25. any two juſtices, 1 *Q.* might licenſe alehouſes; but now by the 2 *G.* 2. *c.* 28. and 26 *G.* 2. *c.* 31. it is enacted, that whereas many inconveniences have ariſen from perſons being licenſed to keep inns and common alehouſes, by juſtices, who living remote from the places of abode of ſuch perſons, may not be truly informed as to the occaſion or want of ſuch inns or common alehouſes, or the characters of the perſons applying for licences to keep the ſame; therefore from henceforth no licence ſhall be granted to any perſon to keep a common inn

or alehouſe, but at a general meeting of the juſtices acting in the diviſion where the ſaid perſon dwells, to be holden for that purpoſe, on the firſt day of *September* yearly, or within twenty days after, and not at any other time. Excepting, that this ſhall not alter the power or the time of granting licences, in cities and towns corporate. 2 *G.* 2. *c.* 28. *ſ.* 11, 12. 26 *G.* 2. *c.* 31. *ſ.* 4. 16.

At a general meeting of the juſtices holden for the diviſion] But it is not neceſſary to ſet forth ſpecially in the licence, that it was granted at a general meeting of the juſtices holden for the diviſion; and therefore a conviction for keeping an alehouſe without ſuch licence, is not good upon the evidence of the licence only, but there muſt be other evidence. *M.* 11 *G.* 2. *King* and *Bryan*, *Seſſ. Ca. Vol.* 2. 183. *Andr.* 81.

2. And the day and place for granting licences ſhall be appointed by two or more juſtices for the diviſion, by warrant (E) under their hands and ſeals, at leaſt ten days before ſuch meeting, directed to the high conſtables, requiring them to order (F) their petty conſtables, or other peace officers, to give notice to the ſeveral innkeepers and alehouſekeepers within their reſpective conſtablewicks, of the day and place of ſuch meeting. And all licences granted at any other time or place ſhall be void. 26 *G.* 2. *c.* 31. *ſ.* 4. The meeting how to be aſcertained.

3. And no licence ſhall be granted to any perſon not licenſed the year preceding (except in cities or towns corporate) unleſs he produce a certificate under the hands of the miniſter and the major part of the churchwardens and overſeers, or elſe of three or four reputable and ſubſtantial houſholders of the place, ſetting forth that ſuch perſon is of good fame and of ſober life and converſation; and it ſhall be mentioned in ſuch licence that ſuch certificate was produced, otherwiſe the licence ſhall be void. 26 *G.* 2. *c.* 31. *ſ.* 2, 16. Certificate of perſons to be licenſed.

Except in cities and towns corporate] In cities and towns corporate, ſuch certificate is not neceſſary, becauſe it is ſuppoſed that the perſons to be licenſed are for the moſt part ſufficiently known to the juſtices. Nevertheleſs, altho' a certificate in ſuch places is not requiſite by this act, yet it is diſcretionary in the juſtices whom they will licenſe, and a *mandamus* in ſuch caſe will not lie to compel the juſtices to licenſe any perſon; and on a conviction for ſelling without licence, the want of ſuch licence can only come in queſtion, and not the reaſon why it was denied. *M.* 4 *G.* 2. *John Giles*'s caſe, *Strange* 881.

4. By the 26 *G.* 2. *c.* 31. No juſtice of the peace, being a common brewer of ale or beer, innkeeper, or diſtiller, or a ſeller of or dealer in ale or ſpirituous liquors, or intereſted in any the ſaid trades, or being a victualler or malſter, ſhall be capable, or have any power to grant licences for ſelling ale or beer or any other liquors, but the ſame ſhall be void. *ſ.* 11. What juſtices are prohibited from granting licences.

5. And all mayors, townclerks, and other perſons whom it may concern, ſhall make out ale licences (G) duly ſtamped (on a 12*d.* ſtamp, 9 *Ann.* *c.* 23. *ſ.* 23.) before the recognizance be taken; Stamp.

taken; on pain of 10*l.* half to the king, and half to the profecutor, with coſts. 6 *G. c.* 21. *ſ.* 56. 1 *Ann. ſtat.* 2. *c.* 22. *ſ.* 6.

Licence for ſpirituous liquors.

6. And no perſon ſhall retail any diſtilled ſpirituous liquors, or ſtrong waters, without a licence from the officer of exciſe taken out ten days before, for which he ſhall pay 40*s.* yearly. 16 *G.* 2. *c.* 8. *ſ.* 8. 24 *G.* 2. *c.* 40. *ſ.* 9.

And ſuch perſons ſhall be firſt licenſed to ſell ale or ſpirituous liquors by two or more juſtices of the peace. 16 *G.* 2. *c.* 8. *ſ.* 11.

And the juſtice's clerk ſhall have 2*s.* 6*d.* and no more, for ſuch licence. 9 *G.* 2. *c.* 23. *ſ.* 14. 24 *G.* 2. *c.* 40. *ſ.* 28, 29.

Which ſaid licence for retailing ſpirituous liquors, is treated of more at large under the article concerning ſpirituous liquors in title Exciſe.

Licence for made wines.

7. No perſon ſhall ſell made wines, without a licence from two juſtices; for which he ſhall pay their clerk 2*s.* 6*d.* and none ſhall be granted but to keepers of victualling houſes, inns, coffee houſes, or alehouſes. 10 *G.* 2. *c.* 17. *ſ.* 10, 11.

IV. Recognizance, and forfeiture thereof.

Recognizance.

1. On granting licences for keeping any common alehouſe or tipling houſe, the perſon licenſed ſhall enter into a recognizance in 10*l.* with two ſureties in 5*l.* each, or one ſurety in 10*l.* (H) as well againſt the uſing of unlawful games, as alſo for the uſing and maintenance of good order and rule to be had and uſed within the ſame, as by their diſcretion ſhall be thought neceſſary and convenient; and if ſuch perſon ſhall be hindred thro' ſickneſs or infirmity, or other reaſonable cauſe to be allowed by the juſtices, to attend in perſon, they may grant the licence, on two ſureties entring into ſuch recognizance in 10*l.* each. 5 & 6 *Ed.* 6. *c.* 25. *ſ.* 1. 26 *G.* 2. *c.* 31. *ſ.* 1.

As by their diſcretion ſhall be thought neceſſary and convenient] Mr. *Dalton* obſerves upon theſe words in the ſtatute of 5 & 6 *Ed.* 6. that the matter of the condition of the recognizance is by the ſtatute partly referred to the *diſcretion of the juſtices.* And he ſays, in ſome ſhires the juſtices have agreed upon certain articles framed by their diſcretion, and generally to be propounded to all common ale ſellers, taking their bond for performance of the ſame; a copy whereof they uſed to deliver to every of them; which manner (he ſays) had been allowed.

And amongſt articles of this kind, he recommends to the juſtices care theſe three eſpecially. 1. That no alehouſekeeper, upon the lord's day, ſhould receive or ſuffer to remain any perſons whatſoever, as their gueſts, in any their houſes or other places, to tipple, eat, or drink; other than travellers, and ſuch as come upon neceſſary buſineſs. 2. That they ſuffer no perſon whatſoever, reſorting to their houſes only to eat or drink, to remain there after nine of the clock in the evening in winter, and ten in ſummer. 3. That they ſuffer no perſon, reſorting to their houſes only

only to eat and drink, to remain tipling there above one hour, other than travellers. *Dalt. c.* 176.

2. Which said recognizance, with the condition thereof, fairly written or printed, shall forthwith, or at the next sessions at farthest, be sent or returned to the clerk of the peace, under the hands of the justices, to be by him entred or filed amongst the records. 26 *G.* 2. *c.* 31. *s.* 1. To be filed at the sessions.

3. And for every licence granted, without taking such recognizance; and for every such recognizance taken, and not sent or returned; every justice signing such licence, shall forfeit 3 *l.* 6 *s.* 8 *d.* 5 & 6 *Ed.* 6. *c.* 25. *s.* 2. 26 *G* 2. *c.* 31. *s.* 1. Penalty for licencing otherwise.

Which said forfeiture, for granting licences without taking recognizances, shall be to him who shall sue, together with costs. 26 *G.* 2. *c.* 31. *s.* 6. But it is not said who shall have the penalty for not returning the recognizance to the clerk of the peace, therefore that shall go to the king.

4. And the clerk of the peace shall keep a register or calendar of all such recognizances, and shall deliver to the justices, at the meeting for granting licences, a true copy of such register or calendar. 26 *G.* 2. *c.* 31. *s.* 5. Recognizances to be calendred.

5. And for every recognizance shall be paid by the clerks of the justices taking such recognizances, to the clerk of the peace for filing or recording the same, and for making and delivering the copies of the register or calendar 1 *s.* which shall be paid to the clerks of the said justices, by the persons licensed, over and above the fees payable to the said justices clerks. 26 *G.* 2. *c.* 31. *s.* 5. Fee for the recognizance.

6. By the 5 & 6 *Ed.* 6. *c.* 25. *s.* 3. The justices shall have power, in their quarter sessions, by presentment, information, or otherwise by their discretion, to enquire of all such persons as shall be admitted and allowed to keep any alehouse or tipling house, and that be so bound by recognizance, if they have done any act whereby they have forfeited the same recognizance; and they shall upon such presentment or information award process against every such person so presented or complained upon before them, to shew why he should not forfeit his recognizance; and shall have power to hear and determine the same, by all such ways and means, as by their discretion shall be thought good. Process on the recognizance.

And by the 26 *G.* 2. *c.* 31. Any justice on complaint or information that such licensed person hath committed any act, whereby in the judgment of such justice the recognizance may be forfeited, or the condition broken, may by summons under hand and seal require such person to appear at the general or quarter sessions, then and there to answer to the matter of such complaint or information; and also may bind the complainant, or any other person, in a recognizance to appear and give evidence; and the sessions may direct the jury which shall there attend for the trial of traverses, or some other jury of twelve honest and substantial men, to be then and there impanelled by the sheriff without fee, to inquire thereof; and if the jury find that such person hath done any act whereby the recognizance is broken, such act being specified in such complaint or information, the court may adjudge him guilty; which verdict and adjudication shall be final; and thereupon the

court ſhall order the recognizance to be eſtreated into the exchequer, to be levied to his majeſty's uſe; and the ſaid perſon ſhall be diſabled to ſell any ale, beer, cyder, perry, or ſpirituous liquors for three years, and any licence granted to him for ſuch term ſhall be void. *ſ.* 7. Provided that the juſtices, at the requeſt of the proſecutor, or of the party complained of, or either of his ſureties, may adjourn the trial to the then next ſeſſions. *ſ.* 8.

And if any perſon ſhall be diſabled, by conviction, to ſell ale, beer, cyder, or perry; he ſhall by the ſame conviction be diſabled to ſell any ſpirituous liquors, any licence before obtained for that purpoſe notwithſtanding; and every licence granted to him for ſelling ale, beer, cyder, perry, or ſpirituous liquors, ſhall be void; and if he ſhall ſell during ſuch diſability, he ſhall be puniſhed as for ſelling without licence (I); and a certificate from the clerk of the peace (which he ſhall grant without fee) of ſuch conviction ſhall be legal evidence. *id. ſ.* 11.

V. To what places the licence ſhall extend.

Licence reſtrained to the place.

1. No licence ſhall intitle any perſon to keep an alehouſe in any other place, than that in which it was firſt kept by virtue of ſuch licence; and ſuch licence with regard to all other places ſhall be void. 26 *G.* 2. *c.* 31. *ſ.* 3.

Perſon dying or removing.

2. And if any licenſed perſon ſhall die, or remove from an alehouſe, the perſon ſucceeding to ſuch houſe may keep on the ſame during the reſidue of the term; on condition, that within thirty days after ſuch death or removal, ſuch perſon obtain ſuch certificate as aforeſaid, to be ſigned by ſome neighbouring juſtice, in order to its being produced at the next general meeting in *September*; and if ſuch certificate be not ſo obtained, and ſigned, within the ſaid thirty days, then immediately from the expiration thereof ſuch licence ſhall be void. *id.*

VI. How long the licence ſhall continue in force.

For how long the licence ſhall be.

Such licence ſhall be made for one year only, to commence on *Sep.* 29. 26 *G.* 2. *c.* 31. *ſ.* 4.

And hereupon ariſeth an inconvenience, in caſe of the removal or change of tenants, which in moſt places is not at *Michaelmas*, when the licence taketh effect, but in the ſummer ſeaſon, to wit, either at old *May-day* or *Whitſuntide*, which prudent antiquity hath eſtabliſhed, as the more convenient, in regard of health, for the changing of habitations; in which caſes, the perſon removing loſeth the benefit of his licence for almoſt half the year, and cannot continue his buſineſs, unleſs he removeth alſo into a houſe already licenſed (and this indeed may ſtand with good reaſon, for perhaps he may remove into a houſe not fit to be licenſed;) but then the perſon coming into his place in the houſe from whence he did remove, may (if ſo be he can only procure a certificate) continue the buſineſs until the end of the year, without any reſtraint of a recognizance, which matter ſeemeth to require ſome conſideration.

VII. Offences

VII. Offences in brewing of ale.

1. By the 1 *W. Seſſ.* 1. *c.* 24. *ſ.* 17. No common brewer or retailer of beer or ale, ſhall uſe in the brewing or working thereof, any melaſſes, coarſe ſugar, honey, or compoſition or extract of ſugar; on pain of forfeiting the liquor, and alſo 100 *l.* half to the king, and half to him that ſhall ſue in ſix months. Undue mixtures in making of ale.

2. And by the 10 & 11 *W.* *c.* 21. *ſ.* 34. If any common brewer or retailer of beer or ale, ſhall uſe any melaſſes, coarſe ſugar, honey, or compoſition or extract of ſugar, in the brewing, making, or working of any ale or beer; or if any common brewer ſhall receive into his cuſtody any quantity of any the ſaid materials exceeding ten pounds, he ſhall forfeit 100 *l.* to be recovered and mitigated as by the laws of exciſe; and the ſervant or other aſſiſting therein, ſhall forfeit 20 *l.* in like manner, and in default of payment ſhall be impriſoned three months. The ſame.

3. And by 9 *Ann.* *c.* 12. No common brewer, innkeeper, or victualler, ſhall uſe any broom, wormwood, or any other bitter ingredient (to ſerve inſtead of hops) in any beer or ale for ſale, (except infuſing the ſame, after it is brewed and tunned, to make broom or wormwood ale or beer;) on pain of 20 *l.* half to the king, and half to the proſecutor, to be levied as by the laws of exciſe. *ſ.* 24, 26. The ſame.

4. And by 12 *Ann.* *ſtat.* 1. *c.* 2. No common brewer, or retailer of beer or ale, ſhall uſe any ſugar, honey, foreign grains, *Guinea* pepper, *eſſentia bine*, *coculus indiae*, or any unwholſome ingredients in the brewing of beer or ale, or mix any of them therewith, on pain of 20 *l.* to be recovered and mitigated as by the laws of exciſe, half to the king, and half to him that ſhall ſue. *ſ.* 32. The ſame.

VIII. Innkeepers obliged to receive gueſts.

If one who keeps a common inn, refuſe either to receive a traveller as a gueſt into his houſe, or to find him victuals or lodging, upon his tendring him a reaſonable price for the ſame; he is not only liable to render damages for the injury, in an action on the caſe at the ſuit of the party grieved, but may alſo be indicted and fined at the ſuit of the king. 1 *Haw.* 225. Innkeeper obliged to receive gueſts.

Alſo it is ſaid, that he may be compelled by the conſtable of the town, or by a juſtice of the peace, to receive and entertain ſuch a perſon as his gueſt; and that it is no way material whether he have a ſign before his door or not, if he make it his common buſineſs to entertain paſſengers. But how the officer may compel him may be a queſtion: It ſeemeth that all the officer can do, is either to cauſe ſuch alehouſekeeper to be ſuppreſſed, or elſe to preſent ſuch offence at the aſſizes or ſeſſions, that ſo ſuch offender may be thereupon indicted. *Dalt.* *c.* 7.

IX. Soldiers quartered in alehouses.

Soldiers quartered in inns.

By the yearly acts against mutiny and desertion, the constable, and in his default, a justice of the peace, may quarter soldiers in inns, livery stables, alehouses, and victualling houses; as is set forth more at large in title **Soldiers**.

X. Concerning ale vessels, and the measure of ale.

Justices to rate the price of vessels.

1. The justices in *Easter* sessions yearly (and mayors in corporations) shall rate the price of all barrels, kilderkins, firkins, and other vessels to be sold for ale or beer to be uttered therein: And if any cooper shall not sell the same according to such rate, he shall forfeit 3 *s.* 4 *d.* half to the king, and half to him that shall sue. 8 *El. c.* 9.

Barrel, what.

2. Every barrel of beer, within the bills of mortality, shall be 36 gallons, and the barrel of ale 32 gallons; and in all other places, 34 gallons shall be reckoned for a barrel of beer or ale. 12 *C.* 2. *c.* 24. *s.* 34. 1 *W. st.* 1. *c.* 24. *s.* 5.

Quarts and pints to be marked.

3. By 11 & 12 *W. c.* 15. which is required to be given in charge at the sessions to the grand jury, it is enacted, that all innkeepers, alehousekeepers, sutlers, victuallers and other retailers of ale or beer, and every person keeping any publick house, and retailing and selling ale or beer, shall retail and sell the same in and from their houses, by a full ale quart or ale pint, according to the standard of the exchequer, in a vessel made of wood, earth, glass, horn, leather, pewter, or of some other good and wholesome metal, made and sized to the standard, and signed, stamped, or marked to be of the content of the said ale quart or ale pint, according to the said standard, either from the exchequer, or from some city, town corporate, borough, or market town, where a standard ale quart or pint, made from the said standard, shall be kept for that purpose; and shall not retale and utter any ale or beer, in any other vessel not signed and marked; on pain of forfeiting not above 40 *s.* nor under 10 *s.* for every offence, half to the poor, and half to him that shall prosecute or sue for the same, to be recovered before one justice, by the oath of one witness, and to be levied by warrant of distress, rendring the overplus, deducting thereout the reasonable charges. *s.* 1, 6. (K). The prosecution to be within thirty days. *s.* 6.

And moreover he shall not detain any goods for the reckoning, but shall be left to his action at law. *s.* 2.

But it is not necessary that beer or ale sold to be spent out of the house, be carried away in standard measures; but it is sufficient if it be measured out by the standard. *s.* 7.

Who shall mark them.

4. And every mayor or chief officer of every city, town corporate, borough, or market town, shall on request to him made, cause all ale quarts and ale pints, made of wood, earth, glass, horn, leather, pewter, or other good and wholsome metal, which shall be brought to him, to be measured and sized with the standard in his custody, and shall then cause the same, and every of them,

them, to be plainly and apparently ſigned, ſtamped, and marked with W R and a crown, for which they ſhall not receive above one farthing for each meaſure; on pain of 5 *l.* to be recovered as aforeſaid, and he ſhall alſo pay to the party grieved treble damages, with coſts, by action at law. 11 & 12 *W.* *c.* 15. *ſ.* 5.

Note, Moſt of the books do ſet forth that the ſub-commiſſioners or collectors of exciſe ſhall procure ſtandard quarts and pints out of the exchequer, for every market town; but this was only required of them before *June* 24. 1700, and not ſince. *ſ.* 3.

5. An indictment will lie for ſelling ale in pots unſealed, altho' the ſtatute appoints another method of proceeding; becauſe meaſures are by the common law, and the ſtatutes only direct the manner of aſcertaining them. *Black.* 10. Indictment.

But in ſuch caſe, the indictment muſt not be upon the ſtatute, but at the common law; and the offence ought to be laid, not for ſelling in pots unſealed, but in pots wanting meaſure.

XI. Conſpiring to enhance the price of ale.

If any brewers ſhall conſpire to ſell their victuals but at certain prices; they ſhall, on conviction in the ſeſſions or leet, by witneſs, confeſſion, or otherwiſe, forfeit 10 *l.* to the king for the firſt offence, and if not paid in ſix days, they ſhall be impriſoned 20 days; for the ſecond offence, 20 *l.* in like manner, or the pillory; for the third offence, 40 *l.* in like manner, or the pillory, loſs of an ear, and to become infamous. 2 & 3 *Ed.* 6. *c.* 15. Conſpiring to raiſe the price.

XII. Selling in veſſels of plate.

By 7 & 8 *W.* *c.* 19. intitled, An act to encourage the bringing plate into the mint to be coined, and for the further remedying the ill ſtate of the coin of the kingdom; it is enacted, that from and after *May* 4. 1696. no perſon keeping any inn, tavern, alehouſe, or victualling houſe, or ſelling wine, ale, beer, or any other liquors by retale, ſhall publickly uſe, or expoſe to be uſed in his houſe, any wrought or manufactured plate whatſoever, or any utenſil or veſſel thereof (except ſpoons) under the penalty of forfeiting the ſame, or the value thereof with coſts, to him who ſhall ſue. Selling in plate.

I have recited the title of the act, that the whole may appear together; becauſe, as the general practice ſeemeth now to be allowed to the contrary, perhaps it may be thought that this clauſe is obſolete, as having been intended only to encourage the coinage at that time, when there was great ſcarcity of money: But how far this may be urged on an action brought, I preſume not to ſay.

XIII. Innkeeper ſuffering tipling.

If any innkeeper, victualler, or alehouſekeeper, or tavern keeper, keeping an inn or victualling houſe, do ſuffer any perſon to continue drinking or tipling therein (except ſuch as ſhall be invited by any traveller, and ſhall accompany him only during his Penalty of ſuffering tipling.

neceſſary

neceſſary abode there; and except labouring and handicraftſmen in cities, towns corporate, and market towns, upon the uſual working days, for one hour at dinner time, to take their diet in an alehouſe; and except labourers and workmen, which for the following of their work by the day or by the great, in any city, town corporate, market town or village, ſhall for the time of their ſaid continuing in work there, ſojourn, lodge or victual in any inn, alehouſe or other victualling houſe; and except for urgent and neceſſary occaſions to be allowed by two juſtices;) he ſhall, on conviction thereof before the mayor, or a juſtice of the peace, on view, or confeſſion, or oath of one witneſs, forfeit 10*s.* to the poor 1 *J. c.* 9. *ſ.* 2. 1 *C. c.* 4. 21 *J. c.* 7.

The ſame to be levied by the conſtables or churchwardens by way of diſtreſs (L); and for default of ſatisfaction in ſix days, the diſtreſs to be appriſed and ſold, rendring the overplus; and for want of ſufficient diſtreſs, the party offending to be by ſuch mayor or juſtice committed (M) to the common gaol, there to remain until the penalty be truly paid. 1 *J. c.* 9. *ſ.* 3.

And if the conſtables or churchwardens do neglect their duty in levying, or do not levy the penalties; or in default of diſtreſs, do neglect to certify the default, by the ſpace of 20 days, to ſuch mayor or juſtice, every perſon ſo offending ſhall forfeit 40*s.* to the poor, to be levied by way of diſtreſs by warrant from ſuch mayor or juſtice; the diſtreſs to be detained ſix days; in which time if payment be not made, the goods to be appraiſed and ſold, returning the overplus; for want of ſufficient diſtreſs, the conſtable or churchwarden ſo offending, to be by ſuch mayor or juſtice committed to the common gaol, there to remain until the penalty be truly paid. 1 *J. c.* 9. *ſ.* 4.

And moreover ſuch alehouſekeeper ſhall be diſabled, for the ſpace of three years, to keep any ſuch alehouſe. 21 *J. c.* 7.

And alſo, the ſaid offence may be inquired of and preſented before juſtices of aſſize, juſtices of the peace in their ſeſſions, mayors in corporations, and in the leet; and thereupon ſuch due proceeding ſhall be had for the conviction, as in ſuch like caſes upon any indictment or preſentment is uſed. 4 *J. c.* 5. *ſ.* 5.

And all conſtables, churchwardens, aleconners and ſidemen, ſhall in their ſeveral oaths incident to their offices, be charged to preſent the ſaid offence. 4 *J. c.* 5. *ſ.* 7.

XIV. Perſons guilty of tipling.

Penalty of tipling.

1. If any perſon (unleſs thoſe excepted under the foregoing head, by 1 *J. c.* 9.) ſhall continue drinking or tipling, in any inn, victualling houſe, or alehouſe, or any tavern keeping an inn or victualling houſe; he ſhall, on conviction thereof before the mayor or a juſtice of the peace, on view, confeſſion, or oath of one witneſs, forfeit for every offence 3*s.* 4*d.* to be paid within one week next after the conviction, to the churchwardens (N), who ſhall be accountable for the ſame to the uſe of the poor: And if he ſhall refuſe or neglect to pay the ſame, it ſhall be levied by diſtreſs (O): And if he be not able to pay the forfeiture, then the mayor, juſtice, or court where

where the conviction shalt be, may punish the offender, by setting him in the stocks (P) for every offence by the space of four hours. 4 *J. c.* 5. *s.* 4. 1 *J. c.* 9. 21 *J. c.* 7. 1 *C. c.* 4.

The said offence may also be inquired of and presented, before justices of assize, justices of the peace in sessions, mayors, and in the leet; and proceeding shall be had thereupon for the conviction, as upon indictment or presentment. 4 *J. c.* 5. *s.* 5.

The offender to be presented, indicted, or convicted in six months. 4 *J. c.* 5. *s.* 11.

And all constables, churchwardens, aleconners, and sidemen, shall in their several oaths incident to their offices, be charged to present the said offence. 21 *J. c.* 7. *s.* 5.

2. And if any alehousekeeper shall be convicted of the said offence, he shall moreover for the space of three years be disabled to keep any such alehouse. 7 *J. c.* 10. 21 *J. c.* 7. Alehousekeeper guilty of tipling.

XV. Concerning drunkenness.

1. Drunkenness excuseth no crime; but he who is guilty of any crime whatever, thro' his voluntary drunkenness, shall be punished for it as much as if he had been sober. 1 *Haw.* 2. Drunkenness no excuse.

2. If any offend their brethren by drunkenness, the churchwardens and sidemen shall present the same to the ordinary, that they may be punished by the severity of the laws, according to their deserts; and such notorious offenders shall not be admitted to the holy communion, till they be reformed. *Can.* 109. Spiritual censure.

And all constables, churchwardens, aleconners, and sidemen, shall be sworn to present the offence of drunkenness. 4. *J. c.* 5. *s.* 7.

3. Every person who shall be drunk, and thereof shall be convicted before one justice, or mayor, on view, confession, or oath of one witness, shall forfeit for the first offence 5 *s.* to be paid within one week after conviction, to the churchwardens (Q) who shall be accountable for the same to the use of the poor; and if he shall refuse or neglect to pay the same as aforesaid, it shall be levied by distress (R); and if the offender be not able to pay the said sum of 5 *s.* he shall be committed to the stocks (S), there to remain by the space of six hours. 4 *J. c.* 5. *s.* 2. 21 *J. c.* 7. *s.* 1, 3. Penalty for the first offence.

And if any constable, or other inferior officer to whom that shall be given in charge by the precept of any mayor or justice, do neglect the due correction of the offender, or the due levying of the penalties where distress may be had; every person so offending shall forfeit 10 *s.* to be levied by distress, by any other person having warrant from any mayor, justice or court, where any such conviction shall be, to be paid to the churchwardens, who shall account for the same to the use of the poor where the offence shall be committed. 4 *J. c.* 5. *s.* 3.

4. And if any person once convicted of drunkenness, shall after that be again convicted of the like offence, he shall be bounden with two sureties in a recognizance of 10 *l.* with condition to be from thenceforth of good behaviour. 4 *J. c.* 5. *s.* 6. 21 *J. c.* 7. *s.* 3. Second offence.

To

To be of good behaviour] Lord *Hale*, ſpeaking of the ſtatute of 34 *Ed* 3 *c.* 1. which gave juſtices power to bind malefactors to the good behaviour, generally, without any time limited, ſays, that it is not meant that the ſame ſhall be perpetual, but in the nature of bail, *viz.* to appear at ſuch a day at their ſeſſions, and in the mean time to be of good behaviour. 2 *H. H.* 136.

Who may inquire thereof.

5. The ſaid offence may alſo be inquired of and preſented before juſtices of aſſize, juſtices of the peace in their ſeſſions, mayors, and in the leet; and thereupon proceſs ſhall be had for the conviction, as upon indictment or preſentment. 4 *J. c.* 5. *ſ.* 5.

In what time.

6. But the offender ſhall be preſented, indicted or convicted in ſix months. 4 *J. c.* 5. *ſ.* 11.

None to be twice puniſhed for the ſame offence.

7. It is alſo provided, that this act ſhall not abridge the eccleſiaſtical juriſdiction. 4 *J. c.* 5. *ſ.* 8.

But when the offender hath been once puniſhed, by any the ways before mentioned, he ſhall not be puniſhed again by any other way or means. *ſ.* 9.

Alehouſekeeper drunk.

8. If any alehouſekeeper ſhall be convicted of being drunk; he ſhall, beſides the penalties abovementioned, be utterly diſabled to keep any ſuch alehouſe, for the ſpace of three years next enſuing the conviction. 7 *J. c.* 10. 1 *C. c.* 4.

Navy.

9. Every perſon in his majeſty's pay in the navy, being guilty of drunkenneſs, ſhall incur ſuch puniſhment as a court martial ſhall think fit to impoſe. 22 *G.* 2. *c.* 33. *Art.* 2.

XVI. Detaining goods for the reckoning.

May detain goods.

1. Since innkeepers are bound by the law to receive gueſts, for that reaſon they may detain their goods till they are paid. 1 *Salk.* 388.

Gueſt, who.

2. *Holt* C. J. doubted whether a man is a gueſt by ſetting up his horſe at an inn, tho' he never went into the inn himſelf; but the other three juſtices held, that ſuch perſon is a gueſt by leaving his horſe, as much as if he had ſtaid himſelf, becauſe the horſe muſt be fed, by which the innkeeper has gain; otherwiſe if he had left a trunk, or a dead thing. 1 *Salk.* 388.

Cannot ſeize after the goods are gone.

3. By the cuſtom of the realm, if a man lies in an inn one night, the innkeeper may detain his horſes, until he is paid for the expences; but if he gives the party credit for that time, and lets him depart without payment, then he hath waved the benefit of the cuſtom, and muſt rely on his other agreement. *T.* 9 *G. Mod. C. in L. & E.* 172.

Reckoning in particulars; and veſſels to be ſealed.

4. Alſo, if any innkeeper, alehouſekeeper, victualler, or ſutler, in giving any account or reckoning in writing, or otherwiſe, ſhall refuſe or deny to give in the particular number of quarts or pints, or ſhall ſell in meaſures unmarked; it ſhall not be lawful for him, for default of payment of ſuch reckoning, to detain any goods or other thing, belonging to the perſon or perſons from whom ſuch reckoning ſhall be due, but he ſhall be left to his action at law for the ſame, any cuſtom or uſage to the contrary notwithſtanding. 11 & 12 *W. c.* 15. *ſ.* 2.

5. It

5. It is ſaid, that if a perſon brings his horſe to an inn, and leaves him in the ſtable there, the innkeeper may keep him till the owner pay for the keeping; and if he eat out as much as he is worth, the maſter of the inn, after a reaſonable appraiſement, may ſell the horſe and pay himſelf. *Yelv.* 66. Whether a horſe may be ſold for his keeping.

But that if one bring ſeveral horſes to an inn, and afterwards takes them all away but one, the innkeeper may not ſell this horſe for payment of the debt of the others, but every horſe is to be ſold to ſatisfy what is due for his own meat. 1 *Bulſt.* 207.

But in the caſe of *Jones* and *Pearle*, *E.* 9 *G.* In trover for three horſes, the defendant pleaded that he kept a public inn at *Glaſtenbury*, and that the plaintiff was a carrier, and uſed to ſet up his horſes there, and 36 *l.* being due to him for keeping the horſes, which was more than they were worth, he detained and ſold them, as well he might: But on demurrer, judgment was given for the plaintiff, an innkeeper having no power to ſell horſes, except within the city of *London*. And beſides, when the horſes had been once out, the power of detaining them for what was due before, did not ſubſiſt at their coming in again. *Str.* 557.

XVII. Goods of a gueſt ſtolen out of an inn.

1. Inns were allowed for the benefit of travellers, who have certain privileges whilſt they are in their journies, and are in a more peculiar manner protected by the law; it is for this reaſon, that the innkeeper ſhall anſwer for thoſe things which are ſtolen within the inn, tho' not delivered to him to keep, and tho' he was not acquainted that the gueſts brought the goods to the inn; for it ſhall be intended to be thro' his negligence, or occaſioned by the fault of him or his ſervants. 8 *Co.* *Caley*'s caſe. Innkeeper anſwerable for goods ſtolen.

2. So if he puts a horſe to paſture, without the direction of his gueſt, and the horſe is ſtolen, he muſt make ſatisfaction. (But otherwiſe, if with his direction.) 8 *Co.* *Caley*'s caſe. Horſe ſtolen out of a paſture.

3. But an innkeeper ſhall not be liable to make any ſatisfaction for a theft or burglary committed in his inn, and in the chamber of any of his gueſts *hired for ſome time*; but if the gueſt leaves goods in his chamber, and returns again *the ſame night*, the innkeeper ſhall be liable for ſuch goods ſtolen. *Cro. Ja.* 188. Difference between a gueſt and a lodger.

4. Alſo, if an innkeeper bids his gueſt take the key of his chamber and lock the door, and that he will not take the charge of the goods; yet if they are ſtolen, he ſhall be anſwerable; becauſe he is charged by law for all things which come to his inn, and he cannot diſcharge himſelf by ſuch or the like words. *Dalt.* *c.* 56. *Black.* 169. Innkeeper ſhall not diſcharge himſelf by refuſing to be anſwerable.

XVIII. Gueſts ſtealing goods.

A gueſt in a common inn, ariſing in the night time, and carrying goods out of his chamber into another room, and from thence to the ſtable, intending to ride away with them, is guilty of felony, Gueſt ſtealing goods.

lony, altho' there was no trespass in the taking of them (which yet is generally required in cases of felony). *Dalt. c.* 40.

Note, The universities are generally excepted out of these acts concerning alehouses.

A. Warrant for selling ale without licence, on 26 *G.* 2. *c.* 31.

Westmorland. { To the constable of ——— in the said county.

WHEREAS A. I. *of* ——— *in the said county, yeoman, hath this day made information upon oath, before me* J. P. *esquire, one of his majesty's justices of the peace in and for the said county, that* A. O. *of* ——— *yeoman,* [or, *Whereas* A. I. *of* ——— *yeoman, hath this day made information, and shewed probable cause before me that he suspecteth that* A. O. *&c.*] *doth upon his own authority, not being thereunto lawfully licensed, keep a common alehouse at* ——— *aforesaid, contrary to the laws in that case made and provided; and that* A. W. *of* ——— *yeoman, and* B. W. *of* ——— *yeoman, are material witnesses to be examined concerning the premisses: You are therefore hereby required forthwith to summon the said* A. O. *to appear before me to answer the premisses, and to be dealt withal according to law; and you are likewise to summon the said* A. W. *and* B. W. *to appear before me at the same time, to testify their knowledge concerning the same. And with them do you appear at the same time, to certify what you shall have done in the premisses. Herein fail you not. Given under my hand and seal the* ——— *day of* ———.

B. Conviction for selling ale without licence, on the 26 *G.* 2. *c.* 31.

By the words of the statute, the conviction shall be in this form, or to this effect:

Middlesex. A. O. *is convicted on his own confession* (or, *on the oath of* ———) *of having sold ale, beer, or other liquors, in the parish of* ——— *in this county, on the* ——— *day of* ——— *without being licensed thereto according to law: This is the first, second, or third conviction. Given under my hand and seal this* ——— *day of* ———.

And this conviction shall be certified to the next sessions, to be filed amongst the records.

C. Warrant

C. Warrant to levy the forfeiture on conviction for selling ale without licence, on 26 *G.* 2. *c.* 31.

Westmorland. { To the constable of ———.

WHEREAS A. O. *of* ——— *yeoman, was this day lawfully convicted before me* J. P. *esquire, one of his majesty's justices of the peace in and for the said county, for keeping of a common alehouse in the parish of* ——— *in the said county, not being thereunto lawfully licensed, according to the statutes in that case made and provided, by reason whereof he hath forfeited the sum of* 40 s. *to be distributed as is herein after mentioned: These are therefore to require you, that you do levy the said forfeiture by distraining the goods and chattels of him the said* A. O. *And if in* [*four*] *days time from your taking the said distress, the said forfeiture, together with reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by the sale thereof pay one moiety of the said forfeiture to* A. I. *of* ——— *yeoman, who informed me of the said offence, and the other moiety to the overseers of the poor of the parish aforesaid, to be by them applied to the use of the poor of the said parish; rendring to him the said* A. O. *the overplus upon demand, the reasonable charges of taking, keeping, and selling the said distress being first deducted. And if no sufficient distress shall be found whereon to levy the said sum of* 40 s. *that then you certify the same to me, together with the return of this precept. Hereof fail not. Given under my hand and seal the* ——— *day of* ———.

D. Commitment for want of distress for selling ale without licence, on 26 *G.* 2. *c.* 31.

Westmorland. { To the keeper of the house of correction [*or*, common gaol] at ——— in the said county.

WHEREAS A. O. *of* ——— *yeoman, was on the* ——— *day of* ——— *duly convicted before me* ——— *one of his majesty's justices of the peace in and for the said county, of having upon his own authority, and not being thereunto lawfully licensed, taken upon him to keep a common alehouse or tipling house at* ——— *aforesaid in the county aforesaid, and there used commonly selling of ale, against the form of the statutes in such case made and provided, whereby the said* A. O. *hath for his said offence forfeited the sum of* 40 s. *And whereas on the* ——— *day of* ——— *I did issue my warrant to the constable of* ——— *aforesaid, to levy the said penalty by distress and sale of the goods and chattels of him the said* A. O. *and to distribute the same according as is directed by the statute in that behalf made; and whereas it duly appears to me, as well on the oath of the said constable, as otherwise, that he the said constable hath used his best endeavours to levy the said sum on the*

goods and chattels of the said A. O. *as aforesaid, but that no sufficient distress can be found whereon to levy the same; These are therefore to command you to receive the said* A. O. *into your custody in the said house of correction, there to remain for the space of one month from the date hereof. Given under my hand and seal, the* ——— *day of* ———.

The like will do for the second and third offence, *mutatis mutandis*; and recite, "And whereas the said *A. O.* hath been once, "at another time, convicted before me of the like offence, and "hath now offended the second time." Or, "And whereas the "said *A. O.* hath been twice heretofore lawfully convicted of the "like offence, and hath now offended the third time, *&c.*"

E. F. Precept to the high constable to issue warrants to the petty constables, to summon alehousekeepers to be licensed; on 5 & 6 *Ed.* 6. *c.* 25. 2 *G.* 2. *c.* 28. and 26 *G.* 2. *c.* 31.

Westmorland. { To *John Bowness*, gentleman, high constable of the *East Ward* within the said county.

IN *pursuance of the statutes in that case made, these are to require you, on sight hereof, to issue out your warrants to all petty constables belonging to the several constablewicks within your said ward, in the form, or to the effect hereafter following. Given under our hands and seals the* ——— *day of* ———.

J. P.
K. P.

The form of the warrant as above directed:

Westmorland, East Ward. { To the constables of ———.

BY *virtue of a warrant from his majesty's justices of the peace acting within the said ward, to me directed, you are hereby required to give notice to all licensed innkeepers and alehousekeepers, and licensed brandy sellers or other retailers of distilled liquors to be drank in their houses, within your constablewick, and also to all persons unlicensed (so far as the same shall come to your knowledge) who do intend to offer themselves to be licensed at the next general meeting of the said justices for that purpose, that they do personally appear before the said justices at* ——— *on the* ——— *day of* September *next, at the hour of* ——— *in the forenoon of the same day, to take or renew their licences for the year ensuing; and also to give them notice, that every person then and there to be licensed, must personally enter into a recognizance in the sum of* 10*l.* *together with two sureties in* 5*l.* *each, or one surety in* 10*l.* *that they will not use or suffer any unlawful games, and that they will keep good order and rule within their respective houses and other places; and*

and if any shall be hindred by sickness, or other reasonable cause to be allowed by the said justices, that he must procure two sureties then and there to be bound in like manner in 10l. *each.*

And unto such persons as have not been licensed for the year preceding, you are further to give notice, that no licence will be granted to any of them, unless he shall also, at the same time and place, produce a certificate under the hands of the minister and the major part of the churchwardens and overseers, or else of three or four reputable and substantial householders of the place where he inhabiteth, setting forth that he is of good fame, and of sober life and conversation.

And you are to make a return to the said justices, at the same time and place, in writing under your hand, containing the names of all such persons as you shall have summoned so to appear before them as is aforesaid, together with their dwelling places, and the signs by which their houses are known.

Hereof fail not. Given under my hand at Raisbeck *in the said county the* ——— *day of* ——— *in the year of our lord* ———.

John Bownes, *high constable.*

G. Licence to keep an alehouse, on the 5 & 6 *Ed.* 6. *c.* 25. 2 *G.* 2. *c.* 28. and 26 *G.* 2. *c.* 31.

Westmorland, East Ward. AT *a general meeting of his majesty's justices of the peace for the said county, acting within the division of the* East Ward *aforesaid in the county aforesaid, holden at* ——— *in and for the said division, for licensing persons to keep common inns and alehouses the* ——— *day of* September *in the* ——— *year of the reign of our sovereign lord* George *the second, of* Great Britain, France, *and* Ireland, *king, defender of the faith, and so forth, and in the year of our lord* ———.

We his majesty's justices of the peace for the said county, whose hands and seals are hereunto set (whereof one is of the quorum) *assembled at the said general meeting, do allow and license* A. B. *yeoman, at the sign of* ——— *in* ——— *within the division and county aforesaid, to keep a common alehouse, or victualling house, and to utter and sell victuals, beer, ale, cyder, and other exciseable liquors, to be drank in the same house wherein he now dwelleth, and not elsewhere, for one whole year from the* 29*th day of this present month of* September, *and no longer: So as the true assize in bread, beer, ale, and other liquors, hereby allowed to be sold, be duly kept; and no unlawful game or games, drunkenness, or any other disorder be suffered in his house, yard, garden, or backside; but that good order and rule be maintained and kept therein, according to the laws of this realm in that behalf made. Given under our hands and seals, the day and year first above written.*

If he hath not been licensed the year before, then these words must be inserted,——*(A certificate under the hands of* ——— *having been first produced unto us, setting forth that the said* ——— *is of good fame, and of sober life and conversation.)*

H. Recognizance of an alehouſekeeper, on 5 & 6 *Ed.* 6. *c.* 25. and 26 *G.* 2. *c.* 31.

Weſtmorland. BE *it remembred, that on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— A. P. *of* ——— *in the county aforeſaid, innkeeper, and* A. S. *of* ——— *yeoman, and* B. S. *of* ——— *yeoman, perſonally came before us* ——— *eſquires, juſtices of the peace for the ſaid county, and acknowledged themſelves to owe to our ſaid ſovereign lord the king, that is to ſay, the ſaid* A. P. *the ſum of* 10 l. *and the ſaid* A. S. *and* B. S. *the ſum of* 5 l. *each, of good and lawful money of* Great Britain, *to be made and levied of their goods and chattels, lands, and tenements reſpectively, to the uſe of our ſaid ſovereign lord the king, his heirs and ſucceſſors, if the ſaid* A. P. *ſhall make default in the condition underwritten.*

The condition of this recognizance is ſuch, that whereas the above-bounden A. P. *is licenſed to keep a common inn and alehouſe for one year from the* 29*th day of this preſent month of* September, *in the houſe where he now dwelleth at* ——— *aforeſaid; if he the ſaid* A. P. *ſhall keep and maintain good order and rule, and ſhall ſuffer no diſorders nor unlawful games to be uſed in his ſaid houſe, nor in any outhouſe, yard, garden, or backſide, thereunto belonging, during the ſaid term, then this recognizance ſhall be void.*

Taken and acknowledged the day and year abovewritten, before us

J. P.
K. P.

I. Conviction for ſelling after diſability, on the 26 *G.* 2. *c.* 31.

By the words of the ſtatute the ſaid conviction ſhall be in this form, or to this effect:

Middleſex. A. O. *is convicted on his own confeſſion* (or, *on the oath of* ———) *of having ſold ale, beer, or other liquors, in the pariſh of* ——— *in this county, on the* ——— *day of* ——— *after being diſabled to ſell the ſame. This is the firſt, ſecond, or third conviction. Given under my hand and ſeal this* ——— *day of* ———.

Which ſaid conviction ſhall be certified to the next ſeſſions, to be filed amongſt the records.

K. Warrant to levy the penalty for selling ale in a vessel not marked; on 11 & 12 *W. c.* 15.

Wermorland. { To the constable of ———.

WHEREAS A. O. *of* ——— *in the parish of* ——— *and county of* ——— *aforesaid, alehousekeeper, hath this day been duly convicted before me* ——— *one of his majesty's justices of the peace in and for the said county, by the oath of* A. W. *a credible witness, of retailing, uttering, and selling beer, on the* ——— *day of* ——— *in his house at* ——— *aforesaid, in a vessel made of earth, which vessel was not signed, stamped, or marked to be of the content of the full ale quart, or ale pint, according to the standard thereof remaining in custody of the chamberlains of his majesty's exchequer, nor in proportion thereunto; whereby the said* A. O. *hath forfeited a sum not exceeding* 40 s. *nor less than* 10 s. *one half part thereof to the use of the poor of the parish of* ——— *aforesaid, and the other half part to* A. I. *who prosecutes for the same: Now I do hereby adjudge the said* A. O. *to have forfeited* 20 s. *for his said offence; and I do hereby impower and require you, to levy the said sum of* 20 s. *upon the goods and chattels of the said* A. O. *by distress and sale thereof, rendring to the said* A. O. *the overplus, if any be, deducting thereout reasonable charges; and that you pay one half part of the said forfeiture to the overseers of the poor of the said parish, for the use of the poor there, and the other half part to* A. I. *who prosecutes for the same as aforesaid. Given under my hand and seal, the* ——— *day of* ———.

L. Warrant to levy the penalty for suffering tipling, on 1 *J. c.* 9.

Westmorland. { To the constable of ——— and to the churchwardens of the parish of ———.

WHEREAS *it hath been duly proved before me* ——— *this present day, That* A. O. *of* ——— *in parish of* ——— *in the said county, alehousekeeper, did upon the* ——— *day of* ——— *permit and suffer* A. D. *of* ——— *shoemaker, and* B. D. *of* ——— *labourer, to remain and continue drinking and tipling in the alehouse of the said* A. O. *in the parish aforesaid, they having no urgent occasion, nor other lawful reason so to do; These are therefore to require you the said constables and churchwardens, or some or one of you, to levy by distress of the goods and chattels of the said* A. O. *the sum of* 10 s. *for the said offence, for the use of the poor of the said parish, and to detain the said goods for the space of six days next after such distress taken, if the said forfeiture of* 10 s. *shall not be satisfied and paid to you within that time; and that after the said six days, if the same shall not be so paid as aforesaid, together with the reasonable charges of taking, and keeping, the said distress, that you do appraise and sell the same to sa-*

tisfy the said forfeiture, rendring the surplusage to the owner upon demand, reasonable charges of taking, keeping, and selling the said distress being first deducted. And if there shall not be sufficient distress, whereby to levy the said sum of 10 s. *that you do certify the same to me, together with the return of this warrant. Given under my hand and seal, the* ——— *day of* ———.

M. Commitment for suffering tipling in default of distress; on 1 *J. c.* 9.

Westmorland. { To the constable of ——— and to the keeper of the common gaol at ——— in the said county.

WHEREAS *on the* ——— *day of* ——— *it was duly proved before me* ——— *that* A. O. *of* ——— *in the parish of* ——— *in the said county, alehousekeeper, did upon the* ——— *day of* ——— *last past, suffer* A. D. *of* ——— *shoemaker, and* B. D. *of* ——— *labourer, to remain and continue drinking and tipling in the alehouse of the said* A. O. *at* ——— *aforesaid, contrary to the statute in that case made; and whereas on the said* ——— *day of* ——— *I did by my warrant lawfully executed, require the constables and churchwardens of the said parish of* ——— *or some of them, to levy the sum of* 10 s. *of lawful money, upon the goods and chattels of the said* A. O. *being forfeited by him, to the use of the poor of the said parish, for the said offence: And whereas it duly appears to me, as well on the testimony of* A. C. *constable of* ——— *aforesaid, as otherwise, that he the said* A. C. *hath used his best endeavours to levy the same as aforesaid, but that the said* A. O. *hath not sufficient goods and chattels, upon which distress may be taken to satisfy the said forfeiture: These are therefore in his majesty's name, to command you the said constable of* ——— *aforesaid, to take the said* A. O. *and to convey him safely to the gaol aforesaid, and to deliver him there to the keeper thereof, together with this warrant: And I do also hereby command you the said keeper, safely to keep and detain the aforesaid* A. O. *in your custody in the said gaol, until the said sum of* 10 s. *shall be duly paid for the use and purpose aforesaid. Given under my hand and seal, the* ——— *day of* ———.

N. Warrant to receive the penalty for tipling; on 4 *J. c.* 5. 1 *J. c.* 9. 21 *J. c.* 7. 1 C. *c.* 4.

Westmorland. { To the churchwardens of the parish of ———.

WHEREAS *it hath been duly proved before me* ——— *that* A. O. *of* ——— *labourer, did on the* ——— *day of* ——— *remain and continue drinking and tipling in a common alehouse, known by the sign of* ——— *at* ——— *in the said parish, in the county aforesaid, contrary to the statutes in such case made and provided, by reason whereof he hath forfeited the sum of* 3 s. 4 d.

3 s. 4 d. *to the use of the poor of the said parish: These are therefore to require you forthwith to demand of the said* A. O. *the said sum of* 3 s. 4 d. *And if he shall refuse or neglect to pay the same as aforesaid, by the space of one week next after the date hereof, that you certify the same to me, together with the return of this precept. Given under my hand and seal at* ——— *in the said county, the* ——— *day of* ———.

O. Warrant to levy the penalty for tipling, on non-payment; on 4 *J. c.* 5. 1 *J. c.* 9. 21 *J. c.* 7. and 1 *C. c.* 4.

Westmorland. { To the constable of —— in the said county.

WHEREAS *it hath been duly proved before me* ——— *that* A. O. *of* ——— *yeoman, did on the* ——— *day of* ——— *remain and continue drinking and tipling in a common alehouse, known by the sign of* ——— *at* ——— *in the parish of* ——— *in the said county, contrary to the statutes in such case made and provided, by reason whereof he hath forfeited the sum of* 3 s. 4 d. *to the use of the poor of the said parish: And whereas on the* ——— *day of* ——— *I did by my warrant require the churchwardens of the said parish to demand of the said* A. O. *the said sum of* 3 s. 4 d. *to the use of the poor as aforesaid: And whereas it appears to me, as well on the oath of* C. W. *churchwarden of the parish aforesaid, as otherwise, that he the said* C. W. *did on the* ——— *day of* ——— *duly demand of the said* A. O. *the said sum for the use as aforesaid, but that he the said* A. O. *hath neglected to pay the same as aforesaid, and that it is not as yet paid: These are therefore to require you forthwith to distrain the goods and chattels of him the said* A. O. *and if within the space of* [*five*] *days next after such distress taken, the said sum shall not be paid, together with the reasonable charges of taking and keeping the same, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, that you do pay the said sum of* —— *to the churchwardens aforesaid, for the use aforesaid; returning to him the said* A. O. *the overplus upon demand, the reasonable charges of taking, keeping, and selling the said distress, being first deducted. And you are to certify to me, with the return of this precept, what you shall have done in the premisses. Given under my hand and seal, the* ——— *day of* ———.

P. Commitment to the stocks for tipling, on inability to pay the penalty; on 4 *J. c.* 5.

Westmorland. { To the constable of ———.

WHEREAS *it hath been duly proved before me* ——— *that* A. O. *of* ——— *yeoman, did on the* ——— *day of* ——— *remain and continue drinking and tipling in a common alehouse, known by the sign of* ——— *in* ——— *in the parish of* ——— *in the*

county aforesaid, contrary to the statutes in such case made and provided, by reason whereof he hath forfeited the sum of 3 s. 4 d. *to the use of the poor of the said parish; And whereas it duly appears to me, that the said* A. O. *is not able to pay the said forfeiture; These are therefore to require you to set the said* A. O. *in the stocks, there to remain by the space of four hours. And for your so doing, this shall be your sufficient warrant. Given under my hand and seal, this* ——— *day of* ———.

Q. Warrant to receive the penalty, on the first conviction of drunkenness; on 4 *J. c.* 21. and 21 *J. c.* 7.

Westmorland. { To the churchwardens of the parish of ——— in the said county.

F*Orasmuch as it hath been fully proved this day, before me* ——— *one of his majesty's justices of the peace in and for the said county, upon the oath of* A. I. *of* ——— *yeoman, that* A. O. *of* ——— *in the county aforesaid, on the* ——— *day of* ——— *at* ——— *aforesaid, in the parish of* ——— *in the said county, was drunk, contrary to the statute in such case made; and the said* A. O. *is thereof convicted before me, by which he hath forfeited the sum of* 5 s. *to be disposed of as is herein after mentioned: These are therefore, in his majesty's name, to command you the said churchwardens to demand and receive of and from the said* A. O. *the said sum of* 5 s. *to be by you accounted for, to the use of the poor of the said parish; and if he shall refuse or neglect to pay the same by the space of one week from and after the date hereof, that you make a return to me of such his refusal or neglect, and of this warrant. Given under my hand and seal, at* ——— *in the said county, the* ——— *day of* ———.

R. Warrant to levy the penalty of drunkenness, on non-payment; by 4 *J. c.* 5. 21 *J. c.* 7.

Westmorland. { To the constable of ——— in the said county.

WHEREAS A. O. *of* ——— *in the parish of* ——— *in the county aforesaid, labourer, was on the* ——— *day of* ——— *convicted before me* ——— *one of his majesty's justices of the peace for the said county, for that he the said* A. O. *was on the* ——— *day of* ——— *drunk, at* ——— *aforesaid, in the parish and county aforesaid, by which he hath forfeited the sum of* 5 s. *And whereas I the said* ——— *did issue my warrant on the* ——— *day of* ——— *to the churchwardens of the parish of* ——— *aforesaid, to demand and receive the said sum of* 5 s. *of and from the said* A. O. *And whereas it duly appears to me, as well on the oath of* C. W. *churchwarden of the parish of* ——— *aforesaid, as otherwise, that they the said churchwardens did on the* ——— *day of* ——— *duly demand the said*

ſum of 5 s. *of and from the ſaid* A. O. *but that he the ſaid* A. O. *hath neglected to pay the ſame as aforeſaid, and that it is not as yet paid: Theſe are therefore to command you forthwith to levy the ſaid ſum by diſtraining the goods and chattels of him the ſaid* A. O. *And if within the ſpace of* [*ſix*] *days next after ſuch diſtreſs by you taken, the ſaid ſum, together with reaſonable charges for taking and keeping the ſaid diſtreſs, ſhall not be paid, that then you do ſell the ſaid goods ſo by you diſtrained as aforeſaid, and out of the money ariſing by ſuch ſale, that you do pay the ſaid ſum of* 5 s. *to the churchwardens of the ſaid pariſh, for the uſe of the poor of the ſaid pariſh, rendring to him the ſaid* A. O. *the overplus upon demand, the neceſſary charges of taking, keeping, and ſelling the ſaid diſtreſs, being firſt deducted. And if the ſaid* A. O. *be not able to pay the ſaid ſum of* 5 s. *and ſufficient diſtreſs cannot be found whereof to levy the ſaid ſum, that you certify the ſame to me, together with the return of this warrant. Given under my hand and ſeal this* ——— *day of* ———.

S. Commitment to the ſtocks for drunkenneſs, on inability to pay the penalty; on 4 *J. c.* 5. 21 *J. c.* 7.

Weſtmorland { To the conſtable of——— in the ſaid county.

WHEREAS A. O. *of*———*in the ſaid county, labourer, was on the* ——— *day of* ——— *convicted before me* ——— *one of his majeſty's juſtices of the peace for the ſaid county, for that he the ſaid* A. O. *was on the* ——— *day of* ——— *drunk at* ——— *aforeſaid, in the pariſh of* ——— *in the ſaid county, whereby he hath forfeited the ſum of* 5 s. *And whereas it duly appears to me, that the ſaid* A. O. *is not able to pay the ſaid ſum of* 5 s. *Theſe are therefore to require you in his majeſty's name, to ſet him the ſaid* A. O. *in the ſtocks, there to remain for the ſpace of ſix hours. Given under my hand and ſeal the* ——— *day of* ———.

Alias Capias. See Proceſs.
Almanacks. See Stamps.

Annuities.

1. BY the ſeveral acts of 4 *W. c.* 3. 5 *W. c.* 5. 5 *W. c.* 20. and 2 & 3 *An. c.* 3. Annuitants on demanding their ſhare of annuities, in the caſe of ſurvivorſhip on the ſaid reſpective acts, ſhall (unleſs the nominee appear in perſon) produce a certificate of the life of ſuch nominee, to be ſigned *(gratis)* by the miniſter and churchwardens where the nominee lives, on the day

Certificate of the nominee's life.

day when the payment ſhall become due: Or otherwiſe the annuitant may make oath of the truth of ſuch nominee's life, on the day when the payment ſhall become due, before a juſtice of the peace where ſuch perſon making oath ſhall reſide; and the juſtice ſhall make a certificate thereof; for which oath and certificate no fee ſhall be taken. And perſons ſwearing falſly ſhall be guilty of perjury, and forging ſuch certificate ſhall be guilty of forgery.

Counterfeiting orders.

2. By the ſeveral acts of 9 *G.* *c.* 12. 4 *G.* 2. *c.* 9. and 9 *G.* 2. *c.* 34. If any perſon ſhall counterfeit any order to receive annuities; or power to transfer the ſame; or the name of the proprietor; or ſhall perſonate ſuch proprietor; he ſhall be guilty of felony without benefit of clergy.

Aſſignment of annuities.

3. By the ſeveral acts of 4 *An.* *c.* 6. 5 *An.* *c.* 19. 5 *An.* *c.* 22. and 6 *An.* *c.* 5. A juſtice may take affidavits of the due execution of the aſſignment or deviſe of annuities, upon the ſaid ſeveral acts reſpectively.

Apothecary. See Phyſicians.

Appeals.

Appeal, what.

1. THIS word has two ſignifications in law; the one is, removing a cauſe from an inferior court or judge, to a ſuperior; as from one or more juſtices, to the quarter ſeſſions.

The other kind of appeal (which is the ſubject of this title) is a proſecution againſt a ſuppoſed offender, by the party's own private action; proſecuting alſo for the crown, in reſpect of the offence againſt the publick. 2 *Haw.* 155.

In what caſes an appeal may be brought.

2. An appeal is brought in three caſes; 1. By a man for a wrong to his anceſtor. 2. By a wife for the death of her huſband. 3. For wrong done to the appellants themſelves, as in the caſe of robbery, rape, or maihem; but this laſt is diſuſed, on account of the nicety of the pleadings, and the charge of the proſecution; and the method of indictment is now generally taken. *Wood* 1072.

Within what time an appeal may be brought.

3. A perſon acquitted on an indictment of murder, ſhall not be ſet at liberty, but ſhall be re-committed, or bailed, till the year and day be paſt; within which time an appeal may be brought. 3 *H.* 7. *c.* 1.

Appeal brought before the ſheriff and coroner.

4. It is certain, that an appeal may be commenced before the ſheriff and coroner, and removed from them into the king's bench by *certiorari*. 2 *Haw.* 156.

Appeal brought before juſtices of the peace.

5. And it ſeems to be holden in *Fitzherbert*'s Abridgment, that juſtices of the peace have power to receive appeals; but there is much greater authority for the contrary opinion. 2 *Haw.* 156.

6. If

6. If the person appealed shall be acquitted, the appellor shall be imprisoned for a year, and restore damages to the party, and be grievously fined to the king. 13 *Ed.* 1. *st.* 1. *c.* 12. That is, if the appeal shall appear to the court to have been malicious. 2 *Hawv.* 198. Person acquitted on appeal.

7. Forasmuch as an appeal is the suit of the party, as well as of the king, hence it is that the king cannot pardon an offender found guilty upon an appeal, as he may when found guilty upon an indictment; for in such case he can only pardon for himself, but not for the party. 2 *Hawv.* 155. Pardon.

Apples and Pears.

WHEREAS apples and pears are frequently sold by measure, commonly called water-measure, the contents whereof are very uncertain; therefore for the future, the said measure shall be round, and in diameter eighteen inches and an half within the hoop, and eight inches deep; and so in proportion: And every measure, commonly called water-measure, by which apples and pears are sold, shall be heaped as usually: And whosoever shall sell or buy any apples or pears by any other measure, shall forfeit 10*s.* half to the informer, and half to the poor, on conviction on the oath of one witness, before one justice (or mayor), to be levied by the petty constable by warrant of the said justice, by distress and sale. 1 *An. st.* 1. *c.* 15. *s.* 1.

But this shall not extend to any measures sealed and allowed by the fruiterers company in *London.* *s.* 2.

Concerning the robbing of orchards, see title Wood.

Apprehending offenders. See Arrest.

Apprentices.

Concerning the ſettlement of apprentices, ſee title Poor.

I. Who may take apprentices.
II. Who are compellable to be bound apprentices.
III. Binding.
IV. Binding of poor apprentices.
V. Money given to bind out poor apprentices.
VI. Binding poor apprentices to the ſea-ſervice.
VII. Differences between the maſter and apprentice.
VIII. Apprentice ſtealing his maſter's goods.
IX. Aſſigning apprentices.
X. Maſter dying.
XI. Apprentices ſetting up their trades.

I. Who may take apprentices.

In huſbandry.

1. EVERY perſon being an houſholder, and having and uſing half a plough-land in tillage, may take any apprentice above the age of ten years, and under eighteen, to ſerve in huſbandry till twenty-one at the leaſt, or till twenty-four as the parties can agree. 5 *El. c.* 4. *ſ.* 25.

In trades in towns corporate.

2. Every perſon being an houſholder, and twenty-four years old at the leaſt, dwelling in any city or town corporate, and exerciſing any art, miſtery, or manual occupation there, may retain the ſon of any freeman, not occupying huſbandry, nor being a labourer, and inhabiting in the ſame, or in any other city or town corporate, to ſerve and be bound as an apprentice, after the cuſtom and order of the city of *London*, for ſeven years at the leaſt, ſo as ſuch apprenticeſhip do not expire before the apprentice ſhall be twenty four years of age. 5 *El. c.* 4. *ſ.* 26.

But no perſon dwelling in any city or town corporate, being a merchant, mercer, draper, goldſmith, ironmonger, imbroiderer, or clothier, ſhall take any apprentice except he be his ſon, or elſe that the father and mother of ſuch apprentice ſhall have an eſtate of inheritance or freehold of 40*s.* a year, to be certified under the hands and ſeals of three juſtices where the lands lie, to the mayor of that city or town corporate, and to be inrolled among the records there. *ſ.* 27.

And the reaſon of this ſeems to be, for that ſuch as are to be bound apprentices in towns corporate, if their parents be of a competent livelihood, then their maſters ſhall be not only better ſecured, but ſuch apprentices alſo in likelihood ſhall have the better means

means to ſet up their trades after their time expired. And concerning ſuch whoſe parents have not 40 *s.* a year are fitter to be bound apprentices to huſbandry, and the like, in the country. *Dalt. c.* 58.

But by reaſon of the great alteration in the value of money ſince that time, this proviſion is become of little uſe; for an eſtate of 40 *s.* a year then, was equal to more than 10 *l.* a year now.

But the citizens of *London* and *Norwich* may take and have apprentices, as before this act. *ſ.* 40.

3. Every perſon being an houſholder, and twenty four years old at the leaſt, and not occupying huſbandry, nor being a labourer, dwelling in any market town not corporate, and exerciſing any art, miſtery, or manual occupation, may have to apprentice the child or children of any other artificer, not occupying huſbandry, nor being a labourer, inhabiting in the ſame or any other ſuch market town in the ſame ſhire. 5 *El. c.* 4. *ſ.* 28. In trades in market towns not corporate.

But no perſon dwelling in any ſuch market town, being a merchant, mercer, draper, goldſmith, ironmonger, imbroiderer, or clothier, ſhall take any apprentice except he be his ſon, or elſe that his father and mother ſhall have an eſtate of inheritance or freehold of 3 *l.* a year, to be certified under the hands and ſeals of three juſtices of the ſhire where the lands lie, to the head officer of ſuch market town where ſuch apprentice ſhall be taken, there to be inrolled of record. *ſ.* 29.

4. Any perſon uſing the art of a ſmith, wheelwright, ploughwright, millwright, carpenter, rough maſon, plaiſterer, ſawyer, lime burner, brickmaker, bricklayer, tyler, ſlater, helier, tylemaker, linen-weaver, turner, cooper, miller, earthen potter, woollen weaver weaving houſhold cloth only, fuller otherwiſe called tucker or walker, burner of oare and woad aſhes, thatcher or ſhingler, wherefoever he ſhall dwell, may take the ſon of any perſon as apprentice, albeit his parents have no land. 5 *El. c.* 4. *ſ.* 30. In any place.

5. Every owner of a ſhip or veſſel, and every houſholder exerciſing the trade of the ſeas by fiſhing or otherwiſe, and every gunner commonly called a canoneer, and every ſhipwright, may take apprentices for ten years or under; and every apprentice ſo taken, being above ſeven years of age, ſhall be by the ſame covenants bound, ordered and uſed to all intents, according to the cuſtom of *London*, ſo that the covenant or bond of apprenticeſhip be made by writing indented, and inrolled in the town where the apprentice ſhall be inhabiting, if it be a town corporate, if not, then in the next town corporate: For which inrollment ſhall be paid not above 12 *d.* 5 *El. c.* 5. *ſ.* 12. Seamen.

6. Every perſon that ſhall have three apprentices in any the crafts of a clothmaker, fuller, ſheerman, weaver, taylor, or ſhoemaker, ſhall keep one journeyman; and for every other apprentice above three, one other journeyman, on pain of 10 *l.* half to the king, and half to him that ſhall ſue in the ſeſſions or other court of record; or if it is in a town corporate, then to be applied as by the charter. 5 *El. c.* 4. *ſ.* 33. Number reſtrained.

No

No hatmaker ſhall have above two apprentices at one time, nor thoſe for any leſs term than ſeven years, on pain of 5 *l.* a month, half to the king, and half to him that ſhall ſue in any court of record: But this not to extend to his own ſon, in his own houſe, ſo as he be bound by indenture for ſeven years, and his term not to expire before he be twenty-two years of age. 1 *J. c.* 17. *ſ.* 3, 5.

Weavers of ſtuffs in *Norfolk* and *Norwich*, that ſhall employ two apprentices, ſhall alſo employ two journeymen; and no maſter ſhall have above two apprentices, or any week boy, to weave in the ſaid trade; on pain of 5 *l.* a month to the king. 13 & 14 *C.* 2. *c.* 5. *ſ.* 18.

II. Who are compellable to be bound apprentices.

Who ſhall be bound.

1. If any perſon ſhall be required by any houſholder, uſing half a ploughland at leaſt in tillage, to be an apprentice and to ſerve in huſbandry, or in any other art, miſtery, or ſcience before expreſſed, and ſhall refuſe ſo to do, then on complaint of ſuch houſekeeper to one juſtice (or head officer) he ſhall ſend for the perſon refuſing; and if he ſhall think the ſaid perſon meet to ſerve, and ſuch perſon refuſe to be bound, he may commit him to ward, there to remain until he be contented, and will be bound. 5 *El. c.* 4. *ſ.* 35.

At what age.

2. But no perſon ſhall be bound to enter into any apprenticeſhip, other than ſuch as be under the age of 21 years. 5 *El. c.* 4. *ſ.* 36.

III. Binding.

Binding to be by deed.

1. One cannot be bound an apprentice without deed. 1 *Salk.* 68.

And indented.

2. And by the 5 *El. c.* 4. it muſt be by deed indented. *ſ.* 25.

M. 1 *G.* 2. *Smith* and *Birch.* An action was brought againſt the defendant, for enticing away and detaining the plaintiff's apprentice, who had agreed by writing to ſerve the plaintiff for ſeven years. Upon evidence it appeared, that the ſtyle of the writing began *This indenture*, &c. but in fact the parchment was not indented, but was a deed poll. On exception taken to the deed, it was inſiſted that the young man was not an apprentice, becauſe he was not bound by indenture. An infant can be bound no other way than as the ſtatute of 5 *El.* directs, which is by indenture, and nothing can make this good. The deed cannot now be indented, for that would be a forgery. Therefore unleſs the plaintiff ſhews the apprentice to be of full age at the time of ſigning ſuch deed, he cannot be accounted his apprentice, and by conſequence no action can lie for detaining the apprentice; neither can the plaintiff prove him to be his ſervant by this deed, for he has declared for an apprentice, and muſt prove him ſo to be. Therefore the plaintiff was nonſuited. *Seſſ. Ca. V.* 1. 222.

And by the name of an apprentice.

3. And an apprentice muſt be retained by the name of an apprentice expreſly, otherwiſe he is no apprentice, tho' he be bound. *Dalt. c.* 58.

4. And

4. And all indentures, covenants, promiſes, and bargains, for having or taking apprentices, otherwiſe than by the ſtatute of 5 *El.* ſhall be clearly void in the law to all intents and purpoſes; and every perſon that ſhall take any apprentice contrary to the ſaid act, ſhall forfeit 10 *l.* half to the king, and half to him that ſhall ſue in the ſeſſions, or other court of record; or if it is in a town corporate, then to the uſe of ſuch town as by the charter. 5 *El. c.* 4. *ſ.* 41. Binding otherwiſe, void.

5. By the ſeveral ſtamp acts, the binding (except it be of pariſh apprentices) ſhall be on a treble ſixpenny ſtamped paper or parchment; and the ſame ſhall not be given in evidence in any court till it be ſtamped, and the duties paid. Stamp.

6. And by the 8 *An. c.* 9. Beſides the ſaid ſtamps and duties, there ſhall be paid the duty of 6 *d.* for every 20 *s.* of every ſum of 50 *l.* or under; and the duty of 1 *s.* for every 20 *s.* of every ſum above 50 *l.* given with any apprentice; and proportionably for greater or leſſer ſums; to be paid by the maſter. *ſ.* 32. Additional ſtamp.

And where any thing, not being money, ſhall be given with ſuch apprentice, the duties ſhall be anſwered for the value thereof. *ſ.* 44.

But this ſhall not extend to any apprentice, put out at the common charge of any pariſh or townſhip, or out of any publick charity. *ſ.* 40.

And the full ſum ſhall be inſerted in the indenture in words at length, and ſhall bear date on the day of the execution thereof; on pain that the maſter ſhall forfeit double, half to the king, and half with full coſts to him that ſhall ſue. *ſ.* 35.

And no ſuch indenture ſhall be given in evidence in any ſuit to be brought by any the parties thereunto, unleſs ſuch party on whoſe behalf the ſame ſhall be given in evidence, do firſt make oath, that to the beſt of his knowledge, the ſum therein inſerted was really and truly all that was directly or indirectly to be given with ſuch apprentice. *ſ.* 43.

The ſaid indentures, within the bills, ſhall be brought to the head office to be ſtamped with a ſtamp for that purpoſe, and the duties paid within one month after date. *ſ.* 36.

And elſewhere ſhall be brought either to the head office within the bills, or to a collector of the ſtamp duties out of the ſaid limits, in two months after date, and the duties thereupon ſhall be paid, and the indenture ſtamped, if it be at the ſaid head office; otherwiſe ſuch collector ſhall indorſe on the indenture, a receipt for the duties in words at length, and ſubſcribe his name thereto. *ſ.* 37.

And if it is within 50 miles of the limits of the bills of mortality, the indenture ſhall within three months after date, and elſewhere within ſix months, be brought to the head office to be ſtamped. *ſ.* 38.

And all ſuch indentures wherein ſhall not be inſerted the full ſum directly or indirectly given, or whereupon the duties ſhall not be paid, or which ſhall not be ſtamped within the time limited, ſhall be void, and not available in any court or place, or to any

purpoſe

purpoſe whatſoever; and the apprentice ſhall be incapable of exerciſing the ſaid trade. *ſ.* 39.

Moreover, by the 9 *An. c.* 21. If the maſter ſhall neglect to pay the duties within the time limited, he ſhall forfeit 50 *l.* half to the king and half with full coſts to him who ſhall ſue. *ſ.* 66.

And by the 18 *G.* 2. *c.* 22. If he ſhall neglect to pay the ſame as aforeſaid, he ſhall, beſides all other penalties, forfeit double duty. *ſ.* 23, 24.

But by the 28 *G.* 2. *c.* 19. For relief of perſons, who have omitted to pay the ſaid duties, on payment thereof on or before *Aug.* 1. 1755. and tendring the indentures to be ſtamped on or before *Sep.* 29. 1755. of which timely notice ſhall be given in the gazette, they ſhall be good.

And there is the like indemnifying clauſe in ſome act every two or three years.

And by the 20 *G.* 2. *c.* 45. If any maſter, having forfeited the double duty, ſhall pay the ſame, and tender the indenture to be ſtamped, within two years after the determination of the apprenticeſhip, and before ſuit hath been commenced for the penalties, the indenture ſhall be valid, and the penalties diſcharged. *ſ.* 5.

And if after the maſter ſhall have forfeited the double duty, the apprentice ſhall in the preſence of, or by writing under his hand ſigned in the preſence of one witneſs, require his maſter to pay the ſame, and the maſter ſhall not do it in three months, and ſuch apprentice ſhall at any time within two years after the determination of his apprenticeſhip, pay the double duty, he may in three months after ſuch payment demand of his maſter double the ſum contracted for in the indenture, and if not paid in three months after, may recover the ſame by action at law, with full coſts. And the apprentice immediately after payment of the ſaid double duties (if his apprenticeſhip ſhall not be then expired) and ſignifying by writing under his hand, that he deſires to be diſcharged from his apprenticeſhip, ſhall be diſcharged accordingly, and ſhall have the ſame benefit of the time he hath ſerved as he would have had in caſe he had been aſſigned, or turned over to a new maſter. *ſ.* 6, 7.

And where any proſecution ſhall be commenced againſt the maſter for the penalties, if the apprentice ſhall pay the double duty at any time in two years after the end of his apprenticeſhip, he may thereupon exerciſe his trade, and the indenture ſhall be valid, and may be given in evidence. *ſ.* 8.

Infant bound, tho' under age.

7. Every perſon that ſhall be bound by indenture, to ſerve as an apprentice in any art, ſcience, occupation, or labour, according to the ſtatute of the 5 *El.* albeit he be within 21 years of age, ſhall be bound as amply to every intent, as if he were of full age at the time of making the indentures. *ſ.* 43.

But this is to be underſtood of a compulſion by the means preſcribed by the ſtatute; for altho' an infant may voluntarily bind himſelf apprentice, and if he continue apprentice for ſeven years, he may have the benefit to uſe his trade; yet neither at the common law, nor by any words of this ſtatute, a covenant or obligation of an infant for his apprenticeſhip ſhall bind him. But if he

miſbehave

misbehave himself, the master may correct him in his service, or complain to a justice to have him punished, according to the statute. But no remedy lieth against an infant upon such covenant. *Cro. Car.* 179.

IV. Binding of poor apprentices.

1. The churchwardens and overseers, or the greater part of them, by the assent of two justices (1 *Q.*) may bind (A) any such children, whose parents they shall judge not able to maintain them, to be apprentices where they shall see convenient, till such man child shall come to the age of 24, and such woman child to the age of 21 or marriage; the same to be as effectual to all purposes, as if such child were of full age, and by indenture of covenant bound him or her self. 43 *El. c.* 2. *s.* 5. Power to bind.

2. And all persons, to whom the overseers shall by the 43 *El.* bind any children apprentices, may take and keep them as apprentices. 21 *J. c.* 28. 3 *C. c.* 4. *s.* 22. Power to take.

3. By the several stamp acts, the indenture must be on a sixpenny stamped piece of paper or parchment; but is exempted from the additional stamps and duties for money given with the apprentice. Indenture to be stamped.

4. And where any poor child shall be appointed to be bound apprentice by the 43 *El.* the person to whom he is appointed to be bound, shall receive and provide for him, and also execute the other part of the indentures; and if he shall refuse so to do, oath being thereof made by one of the churchwardens or overseers, before two justices, he shall forfeit 10*l.* by distress and sale, by warrant (B) of such justices, to the use of the poor of the parish or place where the offence was committed; saving always to the person, to whom any poor child shall be appointed to be bound apprentice, if he shall think himself aggrieved thereby, his appeal to the next sessions, whose order therein shall be final. 8 & 9 *W. c.* 30. *s.* 5. Persons refusing to take.

And as the churchwardens and overseers have power to place out poor children, therefore they are proper judges of persons who are fit to be their masters; and those are, all persons, who by their profession or manner of living have occasion to keep servants; but the same are to be approved of by the justices, and if such master is dissatisfied, he may appeal to the sessions. *Dalt. c.* 58.

T. 13 *W. Minchamp*'s case. Two justices bound an apprentice to a *merchant:* He appealed to the sessions, and the order was discharged. And now the court, on consideration of the matter, confirmed the order of sessions; because the act having made persons compellable to take apprentices, and given an appeal to the sessions, it was in the discretion of the justices at sessions to determine, whether it was or was not fitting to put an apprentice upon any one; and therefore the court would not disturb what the sessions had done, but confirmed the order. 2 *Salk.* 491.

E. 13 *An. Q.* and *Wagstaff.* It was moved to quash an order to compel a person to take an apprentice, because in the close of indenture it was said, that the master, at the end of the term, shall

give his apprentice two ſuits of cloaths. Upon debate, the court held this to be ill; for the juſtices during the term of his apprenticeſhip cannot order him wages, they muſt only order him a maintenance as an apprentice, and cannot order him any thing after the term is ended. So the order was quaſhed. *Foley* 205. *Seſſ. C. V.* 1. 48.

In what, caſe he ſhall go with the farm.

5. A leſſee for years of a farm takes an apprentice, and the term expires before the apprenticeſhip is ended, he muſt go with the farm, if the maſter will permit him; but where a man taketh an apprentice by reaſon of his ability, and the maſter dies before the determination of the apprenticeſhip, ſuch apprentice ſhall go to the executor or adminiſtrator if he hath aſſets, and if none, then he muſt return to the pariſh where laſt ſettled. *Show.* 405.

V. Money given to bind out poor apprentices.

By the 7 *J. c.* 3. All money given by any perſon to be continually employed for the binding out apprentices, ſhall be employed in manner following, unleſs otherwiſe ordered by the givers; *viz.* All corporations or towns corporate, and in places not corporate, the miniſter, conſtables, churchwardens, overſeers, or the moſt part of them, ſhall have the nomination and placing of ſuch apprentices, and ordering of ſuch money; and if they ſhall not employ the ſame accordingly, every perſon offending ſhall forfeit 3 *l.* 6 *s.* 8 *d.* half to the poor, and half to him that ſhall ſue. *ſ.* 2.

And the maſter that ſhall receive the money, ſhall be bound with one or two ſureties in double the ſum, unto ſuch corporation, or to the other perſons appointed by this act in places not corporate, to take care of it, on condition to repay it at the end of ſeven years, or within three months thereof; and if the apprentice ſhall happen to die within the ſeven years, then within one year after ſuch death; and if the maſter ſhall die, then within one year after ſuch maſter's death. *ſ.* 3.

And the ſaid money ſhall always be put forth in three months after it ſhall come to the ſaid parties hands; and if there are not then fit perſons to be bound apprentices, within the places where the money is given to be employed, it ſhall be diſpoſed of for binding ſome of the pooreſt children of any adjoining pariſh. *ſ.* 4.

And choice ſhall always be made of the pooreſt children; and no ſuch apprentice ſhall be above 15 years of age when bound. *ſ.* 5.

And the ſaid perſons, in places not corporate, ſhall yearly within a month after *Eaſter*, account to their ſucceſſors before two juſtices dwelling in or next to the place. *ſ.* 6.

And if any of the truſtees ſhall break their truſt, or commit any offence for which no penalty is given by this act; any perſon may petition the lord chancellor, who may iſſue a commiſſion to hear and determine the ſame, and may levy the money miſemployed upon ſuch defaulters, or otherwiſe upon ſuch able inhabitants of the place, as they ſhall think fitteſt; and perſons aggrieved may appeal to the lord chancellor. *ſ.* 7.

VI. Bind-

VI. Binding poor apprentices to the sea service.

1. It shall be lawful for two justices, and for the head officers in corporations, and for the churchwardens and overseers of the several parishes or townships, with the consent of such justices or head officers, to bind and put out any boy of the age of ten years or upwards, or who shall be chargeable, or whose parents shall be chargeable, or who shall beg for alms, to be an apprentice to the sea service, to any subject being master or owner of any ship or vessel, until he shall attain the age of 21 years. 2 & 3 *Ann. c.* 6. *s.* 1. Who may be bound.

And every person to whom any poor parish boy shall be put apprentice by the 43 *El.* may, with the consent of two justices dwelling near the parish where such poor boy was bound, or with the like consent of the chief officer in a corporation, at the request of the master, his executors, administrators, or assigns, by indenture assign over such poor boy apprentice, to any master or owner of a ship or vessel, using the sea service, during the remaining time of his apprenticeship. *s.* 6.

2. And every master or owner of a ship, from 30 to 50 ton burden, shall be obliged to take one such apprentice, and one more for the next 50 ton, and one more for every hundred ton such ship shall exceed the burden of an hundred ton; on pain of forfeiting 10 *l.* to the poor of the parish from whence such boy was bound. *s.* 8. Who shall take.

But no master shall be obliged to take any such apprentice, under 13 years of age, or who shall not appear to be fitly qualified both as to health and strength of body for that service. 4 *Ann. c.* 19. *s.* 16.

3. The boy's age shall be inserted in the indenture, being truly taken from a copy of the entry in the register book (where it can be had), which copy shall be given and attested by the minister without fee: And where no such entry can be found, two such justices, and such head officers, shall as fully as they can inform themselves of such boy's age, and from such information shall insert the same in the indentures. 2 & 3 *An. c.* 6. *s.* 1. Age to be inserted in the indenture.

4. And the churchwardens and overseers shall pay down to the master, at the time of the binding, the sum of 50 *s.* for cloathing and bedding; and the charges by this act appointed, shall be allowed on their accounts. 2 & 3 *An. c.* 6. *s.* 2. What money shall be given with him.

5. The churchwardens and overseers shall send the indentures to the collector of the customs at the port whereunto the master belongeth; who shall enter the indenture in a book, and make an indorsement upon the indenture of the registry thereof, subscribed by him, without fee. And if he shall neglect or refuse to enter such indentures, and indorse the same, or make false entries, he shall forfeit 5 *l.* to the poor of the parish from whence such boy was bound. 2 & 3 *An. c.* 6. *s.* 5. Indenture to be registred.

6. Such apprentice shall be conveyed to the port to which his master belongeth, by the churchwardens and overseers, or their Apprentice how conveyed to the port.

agents; and the charges thereof ſhall be paid as by the vagrant act of 11 & 12 *W.* 2 & 3 *An.* *c.* 6. *ſ.* 10.

That is to ſay, out of the gaol and marſhalſea money; which by the 12 *G.* 2. *c.* 29. is directed to be paid out of the general county rate.

Counterpart to be then executed.

7. The counterpart of the indenture ſhall be ſealed and executed by the maſter, and atteſted by the collector of the port, and the conſtable or other officer who carries the apprentice; which officer ſhall tranſmit ſuch counterpart, to the churchwardens and overſeers of the place from whence the apprentice was bound. 2 & 3 *An.* *c.* 6. *ſ.* 11.

Protection from being impreſſed.

8. And the collector or his deputy ſhall tranſmit a certificate under his hand, to the commiſſioners of the admiralty, containing the name and age of ſuch apprentice, and to what ſhip he belongs; and on receipt of ſuch certificate, a protection ſhall be made and given *gratis* to ſuch apprentice, till he attain the age of 18 years. 2 & 3 *An.* *c.* 6. *ſ.* 5.

Alſo every perſon who ſhall voluntarily bind himſelf apprentice to the ſea ſervice, ſhall not be impreſſed for three years from the date of his indentures; which indentures ſhall be regiſtred, and certificates thereof given and tranſmitted by the collector as aforeſaid; on receipt of which certificates, protections ſhall be made and given for the firſt three years, without fee. *id.* *ſ.* 15.

But by 4 *An.* *c.* 19. No perſon of the age of 18 years ſhall have any protection from being impreſſed, who ſhall have been in any ſea ſervice, before he bound himſelf apprentice. *ſ.* 17.

But every perſon not having before uſed the ſea, who ſhall bind himſelf apprentice to ſerve at ſea, ſhall be exempted from being impreſſed for three years: and the commiſſioners of the admiralty, on due proof of the circumſtances, ſhall grant a protection accordingly, without fee. 13 *G.* 2. *c.* 17.

When impreſſed, the maſter to have the wages.

9. When ſuch pariſh or voluntary apprentice ſhall be impreſſed, or voluntarily enter into the king's ſervice, the owner or maſter, his executors, adminiſtrators, or aſſigns, ſhall be intitled to able ſeamens wages, for ſuch of the apprentices, as ſhall upon due examination be found qualified for the ſame, notwithſtanding their indentures of apprenticeſhip. 2 & 3 *An.* *c.* 6. *ſ.* 17.

Exempted from the 6d. a month.

10. Such poor boys bound out, or aſſigned over, to the ſea ſervice, until they ſhall attain to the age of 18 years, ſhall be exempted from the payment of 6 *d.* a month to *Greenwich* hoſpital. 2 & 3 *An* *c.* 6. *ſ.* 7.

Maſter to enter his apprentices on clearing out.

11. Every maſter ſo obliged to take ſuch apprentice, ſhall after his arrival into any port aforeſaid, and before he clears out of ſuch port, give an account in writing under his hand, to the collector, containing the names and number of ſuch apprentices as are there remaining in his ſervice. 2 & 3 *An.* *c.* 6. *ſ.* 9.

The ſame to be inſerted in the cocquet.

12. And every cuſtom houſe officer ſhall inſert at the bottom of their cocquets, the number of men and boys on board the reſpective ſhips at their going out, deſcribing the apprentices by their names, ages, and dates of their indentures, for which no fee ſhall be taken. 2 & 3 *An.* *c.* 6. *ſ.* 14.

13. And

13. And the collector in the port shall keep a register, containing the number and burden of all ships belonging to the port, together with the masters or owners names, and also the names of all such apprentices in such ships, and from what parishes and places they were sent; and shall transmit *(gratis)* true copies thereof signed by him, to the quarter sessions, or to such towns corporate, parishes, or places, when and so often as he shall be reasonably required so to do; and every collector refusing or neglecting to send such copy, shall forfeit 5 *l.* to the poor of the parish from whence such boy was bound. 2 & 3 *An. c.* 6. *s.* 13.

Registry to be kept in the ports.

14. Two justices near the port, and mayors of towns corporate, in or near adjoining to such port, to which such ship or vessel shall at any time arrive, may determine all complaints of ill usage from the master to such apprentice, and also of all such as shall voluntarily put themselves apprentices to the sea service, and make such order therein as they are now enabled by law to do, in other cases between masters and apprentices. 2 & 3 *An. c.* 6. *s.* 12.

Differences between such masters and apprentices.

15. All the penalties aforesaid shall, by warrant of two justices of the county, city, or town corporate, be levied by distress and sale. 2 & 3 *An. c.* 6 *s.* 18.

Penalties.

16. If the master shall die during the term, his widow, or his executor or administrator may assign over such apprentice to any other master who hath not his complement of apprentices. 4 *An. c.* 19. *s.* 16.

Master dying.

VII. Differences between the master and apprentice.

1. The master is allowed by law with moderation to chastise his apprentice. *Dalt. c.* 58.

Master may chastise his apprentice.

2. An apprentice cannot be discharged but by writing; for that an apprentice cannot be but by writing: but the master and apprentice may, by agreement between themselves, leave each other; and if so, then the master may give leave under his hand for the apprentice to depart; and then one justice out of sessions may discharge him, allowing the cause of his departure. *Dalt. c.* 58.

Whether the master himself can discharge his apprentice.

But it seemeth that this shall not extend to parish apprentices, for that there the overseers are parties to the contract, which cannot therefore be avoided by any agreement between the master and his apprentice.

But if the master and his apprentice cannot agree, they may proceed in one of these two ways; either upon the statute of the 5 *El. c.* 4. or upon the statute of 20 *G.* 2. *c.* 19.

3. By the 5 *El. c.* 4. *If any such master shall misuse or evil intreat his apprentice, or the said apprentice shall have any just cause to complain, or the apprentice do not his duty to his master, then the said master or apprentice being grieved, and having cause to complain, shall repair unto one justice* (C D) *of the county, or to the mayor or other head officer of the said city, town corporate, or market town, or other place where the master dwelleth; who shall by his wisdom and discretion take such order and direction between the master and his apprentice, as the equity of the cause shall require;*

Differences between the master and apprentice by 5 El. c. 4.

and if for want of good conformity in the maſter, the ſaid juſtice (or head officer) cannot compound and agree the matter, he ſhall take bond of the ſaid maſter to appear at the next ſeſſions; and on his appearance, and hearing of the matter there, if it be thought meet to diſcharge the ſaid apprentice, then the juſtices, or four of them at the leaſt (1 Q.) *or the ſaid mayor or other head officer, with the conſent of three other of his brethren, or men of beſt reputation in ſuch city, town corporate, or market town, ſhall have power, in writing* (E) *under their hands and ſeals, to pronounce and declare, that they have diſcharged the ſaid apprentice of his apprenticehood, and the cauſe thereof: And the ſaid writing, being inrolled by the clerk of the peace, or town clerk, amongſt the records, ſhall be a ſufficient diſcharge for the apprentice againſt his maſter, his executors and adminiſtrators. And if the default ſhall be found to be in the apprentice, then the ſaid juſtice, or the ſaid mayor or other head officer, with the aſſiſtance aforeſaid, ſhall cauſe ſuch due correction and puniſhment to be adminiſtred unto him, as by their wiſdom and diſcretions ſhall be thought meet.* ſ. 35.

If any ſuch maſter] That is, any ſuch maſter as is before mentioned in this ſtatute, in the trades therein ſpecified; and the former reſolutions confined the ſenſe of the ſtatute to ſuch trades only, but the later adjudications ſeem to extend the equity thereof to other trades not mentioned in the ſtatute; as in the following inſtances:

M. 7 W. K. and *Gately.* On a *certiorari* it was moved to quaſh an order of ſeſſions, for the diſcharge of one *Edward Green* from his apprenticeſhip to the defendant *Gately.* The fact was, that *Gately* was a mountebank, and being at a place in *Yorkſhire,* where he kept a publick ſtage, *Green* was by indenture bound apprentice to him in this manner, *viz.* to *Robert Gately,* ſurgeon, to learn the trade he now uſeth; and immediately he went upon the ſtage, and ever ſince continued in the employ. After which, being with his maſter *Gately* in *Middleſex,* he complained to the juſtices, that his maſter did not teach him the trade. Upon which they diſcharged him. This being done, *Green* ſet up the trade of mountebank himſelf. It was moved to quaſh the order, the juſtices being willing, becauſe they were impoſed upon. And the exception was, that the ſtatute of the 5 *El.* in diſcharging apprentices is confined, and extends only to apprentices mentioned in that clauſe, and there neither ſurgeon nor mountebank is mentioned: And tho' a ſurgeon may be a trade within the ſtatute, which a man cannot exerciſe without ſerving an apprenticeſhip to, becauſe that clauſe of the ſtatute is general; yet this part of the ſtatute, relating to the diſcharge of apprentices, extends only to trades there mentioned. By the court; The clauſe relating to the diſcharge of apprentices is general, and goes to all manner of apprentices, even to thoſe of merchants; but afterwards the court were of opinion, that the power of diſcharging reaches only to the trades mentioned in the ſtatute, among which a ſurgeon is not mentioned; for that, tho' as to the ſerving ſeven years apprenticeſhip, a ſervant comes under the general term of arts and miſteries,

yet

yet the power of difcharging reaches only to the trades particularly mentioned. 2 *Salk.* 471, 2.

And *M.* 12 *An.* *Q.* and *Furnefe.* It was held, that the ftatute extends only to the trades therein mentioned; and therefore not to a glafs bottle maker. *Cafe of S.* 29.

On the other hand, in the cafe of *K.* and *Collingbourn, M.* 12 *G.* Exception was taken to an order of difcharge, that the juftices could not difcharge the apprentice, becaufe the trade to which he was bound, *viz.* a glazier, was not within the ftatute: But not allowed; for tho' formerly it was held, that the trade ought to be a trade within the ftatute, yet the later refolutions have been otherwife. L. *Raym.* 1410. *Str.* 663.

And in *K.* and *Amies,* 7 *G.* 2. It was refolved, that the juftices have jurifdiction as to difcharging apprentices, as well in other trades as thofe mentioned in the ftatute. *Nelf. Appr.*

So in *K.* and *Cuft, E.* 8 *G.* 2. that the ftatute extends to trades not mentioned therein. *Nelf. Appr.*

Shall mifufe or evil intreat his apprentice] *E.* 8 *G.* 2. *K* and *Eafman.* An apprentice was difcharged, the mafter having *ufed him unkindly*, and refufing to provide for and entertain him: But by the court, this is not a good ground for the difcharge; for there is a power to oblige the mafter to receive and entertain the apprentice, and *ufing him unkindly* is too loofe. *Strange* 1014.

Or the apprentice do not his duty to his mafter] *T.* 4 *G.* *K.* and Inhabitants of *Hales Owen.* An order reciting that *Jofeph Higgen* was bound out by indenture, as the ftatute requires, to *John Parks,* and being lame, and having the king's evil, and in the opinion of furgeons incurable; therefore the juftices difcharge the mafter from his apprentice. It was moved to confirm the order, becaufe the mafter cannot now have the end of the binding, which was, the fervice of his apprentice. But it was anfwered, that the ftatute only impowers the juftices to difcharge for mifbehaviour, and not for ficknefs. And quafhed by the court; for the mafter takes the apprentice for better and worfe, and is to provide for him in ficknefs and in health. *Strange* 99.

Shall repair unto one juftice] Upon an order made at the feffions to difcharge an apprentice, it did not appear, that he applied himfelf to a juftice firft. And *Holt* Ch. J. was of opinion, that the juftice hath power to make an order, and if obeyed by the mafter, then the feffions can have no power; if difobeyed, then the juftice upon complaint may bind the mafter to the feffions, and that the feffions have no power otherwife. 1 *Salk.* 67.

T. 13 *W.* *K.* and *Johnfon.* Exception was taken to an order for difcharging an apprentice, that the complaint was made originally at feffions, without any previous application to a fingle juftice out of feffions: *Holt* Ch. J. delivered the opinion of the court, That the order was good; if it had been a new queftion, he fhould have held a prior application to fome juftice out of feffions neceffary; but after fo many orders affirmed in this court, which have been otherwife, it is too late to unfettle that now. 1 *Salk.*, 68.

So alſo, in the caſe of *K.* and *Gill, H.* 5 *G.* It was ſaid by the court,—It hath been ſo often reſolved, that the ſeſſions hath an original juriſdiction, that we will not ſuffer it now to be made a queſtion, though it might be doubtful upon the ſtatute itſelf. *Strange* 143.

And, *T.* 12 *G. K.* and *Davie.* The court agreed, that it is a point not now to be diſputed, that the ſeſſions hath an original juriſdiction to diſcharge apprentices. *Strange* 704.

On his appearance] *E.* 13 *W. Ditton*'s caſe. It was moved to quaſh an order made for the diſcharge of an apprentice. The queſtion aroſe upon the clauſe of the ſtatute, which directs, that upon appearance of the maſter, the apprentice may be diſcharged by four juſtices, after one juſtice out of ſeſſions hath endeavoured to compoſe the matter in difference. And in this caſe, it was objected, that *Ditton* the maſter was bound over to appear, and did not; and the juſtices have but a limited juriſdiction, and it is expreſly directed by the act, that the diſcharge is to be made on the appearance of the maſter; beſides, there is another remedy, to proceed on the recognizance, which is forfeited by not appearing. By the court; The act muſt have a reaſonable conſtruction, ſo as not to permit the maſter to take advantage of his own obſtinacy; and it would be very hard, that ſuppoſing the maſter is profligate, and runs away, the apprentice ſhall never be diſcharged. 2 *Salk.* 490.

H. 5 *G. K.* and *Gill.* An order of ſeſſions for diſcharging an apprentice was quaſhed, becauſe it did not ſet forth, that the maſter was ſummoned, or did appear. *Strange* 143.

So alſo, *E.* 8 *G.* 2. *K.* and *Eaſman.* The order was quaſhed, becauſe it did not appear that the maſter was preſent or ſummoned, which it is plain the act intended he ſhould be. *Strange* 1013.

Inrolled by the clerk of the peace] *T.* 4 *G. K.* and Inhabitants of *Hales Owen.* The order of diſcharge was not inrolled; and by the court for that reaſon held ill. *Strange* 99.

Shall be a ſufficient diſcharge for the apprentice againſt his maſter] But as the juſtices may diſcharge the apprentice from his maſter, for ill uſage; ſo alſo they may diſcharge the maſter from the apprentice for evil and diſorderly behaviour. *Read. Appr.*

Diſcharge] *T.* 13 *W. K.* and *Johnſon.* Exception was taken to an order of diſcharge, that the juſtices had ordered money to be returned: But by the court, the order is good. And *Holt* Ch. J. ſaid, he never doubted of that matter, for it is a power conſequential upon their juriſdiction to diſcharge. 1 *Salk.* 68.

But in the caſe of *K.* and *Vandeleer, M.* 4 *G.* The juſtices at the ſeſſions did order an apprentice to be diſcharged, and that the maſter having received 5 *l.* with him, ſhould refund 3 *l.* as a further proviſion for him. This was moved to be quaſhed, becauſe the ſtatute which gives the juſtices power to diſcharge, gives them no authority to order any money to be returned. By the court; It is very hard, that if the maſter miſuſeth his apprentice, the next day after he is bound, he ſhould pay back nothing if he is diſcharged:

charged: It will be an encouragement to masters to treat their apprentices ill; but the statute being silent, the order must be quashed. *Strange* 69.

Shall cause due correction and punishment to be administred] It seemeth that by the 7 *J. c.* 4. one justice may send the apprentice to the house of correction as an idle and disorderly person, if he is in fault; tho' this cannot be done by this act of the 5 *El. Wood* 85.

4. By the 20 *G.* 2. *c.* 19. *On complaint* (F) *unto two justices, by any parish apprentice, or other apprentice upon whose binding out no larger a sum than* 5 l. *was paid, concerning any misusage, refusal of necessary provision, cruelty, or other ill treatment, they may summon* (G) *the master or mistress, to appear before them at a reasonable time to be named in such summons; and on proof upon oath of the truth of the said complaint (whether the master or mistress be present or not, if service of the summons be also upon oath proved) the said justices may discharge* (H) *the apprentice by warrant or certificate under their hands and seals, for which warrant or certificate no fee shall be paid.* s. 3.

Differences between the master and apprentice by 20 G. 2. c. 19.

And such justices on complaint (I K) *on oath by any master or mistress, against any such apprentice, concerning any misdemeanor, miscarriage, or ill behaviour, may hear and determine the same, and punish the offender, by commitment* (L) *to the house of correction, there to remain and be corrected, and held to hard labour for a reasonable time, not exceeding one kalendar month, or otherwise by discharging* (M) *such apprentice.* s. 4.

Persons aggrieved by any determination, order or warrant of such justices (except any order of commitment) may appeal to the next sessions; who may award costs to either party not exceeding 40 *s.* to be levied by distress and sale. *s.* 5.

And no *certiorari* shall issue to remove any the said proceedings. *s.* 6.

5. If any apprentice of husbandry, or of any art or occupation aforesaid, shall flee into any other shire, the justices, mayors or other head officers being justices, may issue writs of *capias* to the sheriffs of the counties or other head officers of the places whither he shall so flee, to take his body, returnable before them at what time shall please them; so that if he come by such process, he may be put in prison, till he find sufficient surety well and honestly to serve his master. 5 *El. c.* 4. *s.* 47.

Apprentice fleeing into another shire.

And by the act of 24 *G.* 2. *c.* 55. If a justice shall issue a warrant against such person, and he shall escape into another shire; the constable or other person, on having the warrant indorsed by a justice in such other shire, may arrest him there, and carry him before a justice in such other shire, if the offence is bailable, to find bail, or else shall carry him back before a justice in the shire from whence the warrant did first issue.

VIII. Apprentice ſtealing his maſter's goods.

By the 21 *H.* 8. *c.* 7. Servants going away with their maſters goods, with intent to ſteal them, ſhall be guilty of felony; but not to extend to apprentices.

And by 12 *An. ſt.* 1. *c.* 7. Perſons ſtealing to the value of 40*s.* being in a dwelling houſe or outhouſe thereto belonging, tho' ſuch houſe be not broken, and tho' no perſon be therein, ſhall be guilty of felony without benefit of clergy. But this not to extend to apprentices under fifteen years of age.

But if they be fifteen years of age, they ſhall be guilty as other perſons.

IX. Aſſigning apprentices.

The maſter aſſigning, and the apprentice himſelf conſenting, will not make him an apprentice to the aſſignee within the fifth of *El.* But by the cuſtom of *London,* he may be turned over to another. *Dalt. c.* 58.

And an aſſignment to the ſea ſervice is good by act of parliament, as is before mentioned.

E. 3 *G. K.* and *Barnes.* Order returned on a *certiorari:* It is reſolved by the juſtices at the ſeſſions, where a perſon was bound an apprentice to *Barnes* by the pariſh officers, and *Barnes* had aſſigned him to another, that the aſſignment is void, and they direct *Barnes* to take his apprentice again. But by the court; The ſeſſions had no power to judge of the validity of a deed, or to hinder a man from aſſigning his apprentice. The covenant to provide for him is well performed, if the perſon to whom he is bound aſſigns him to another to provide for him. Wherefore the order was quaſhed. *Foley* 155. *Strange* 48.

For the juriſdiction of the juſtices extends no farther, than to compel the maſter to take care of his apprentice; but in what manner he does it, whether in his own houſe or otherwiſe, is nothing to them. But if the aſſignee of the apprentice doth not provide for him, the firſt maſter may be compelled to do it, and he may take his remedy over. *Seſſ. C. V.* 1. 110.

X. Maſter dying.

It hath been ſaid, that if the maſter dies, the apprentice goes to the executor or adminiſtrator to be maintained, if there are aſſets; but the executor or adminiſtrator may bind him to another maſter, for the remaining part of his time.

And in *M.* 10 *W. K.* and *Peck. Eyre* J. held, that an apprenticeſhip is a perſonal truſt between the maſter and ſervant, and determines by the death of either of them; and by the death of either of them, the end and deſign of the apprenticeſhip cannot be obtained, and it may be the executor is of another trade; he admitted, covenant would lie againſt the executor, but in that there is no inconvenience, becauſe the executor may make his defence

fence by pleading no aſſets, or debts of a higher nature. *Holt* Ch. J. ſaid, that by the cuſtom of *London*, the executor ſhall put the apprentice to another maſter of the ſame trade; and that in other places, it would be very hard to conſtrue the death of the maſter to be a diſcharge of the covenants; he ſaid, it had been held, that the covenant for inſtruction failed, but that he ſtill continues an apprentice with the executor, as to maintenance. 1 *Salk.* 66.

E. 20 *G.* 2. *Baxter* (widow and executrix) and *Burfield.* In debt on bond, conditioned for *Matthias Anderſon*'s performance of the covenants in an indenture of apprenticeſhip, whereby he was bound to the plaintiff's teſtator, who was a mariner: the defendant pleaded, that *Anderſon* ſerved faithfully to the death of the teſtator: the plaintiff replied, that ſince the death of the teſtator, *Anderſon* had abſented from her ſervice: to which there was a demurrer. And after argument at bar, *Lee* Ch. J. delivered the reſolution of the court, *viz.* That they were all of opinion, the defendant ſhould have judgment, and that the executrix could maintain no ſuch action. The binding was to the *man*, to learn *his* art, and ſerve *him*, without any mention of executors. And as the words are confined, ſo is the nature of the contract; for it is fiduciary, and the apprentice is bound from a perſonal knowledge of the integrity and ability of the maſter. *H.* 8 *An. Horne* and *Blake*; An award that an apprentice ſhould be aſſigned, was held void; unleſs there was a cuſtom, or the concurrence of the apprentice. And they held, it was not material, that according to *Cro. Eliz.* 553. the aſſets were liable on the maſter's covenant to maintain. Therefore judgment was given for the defendant. *Strange* 1266.

Note, the words in *Cro. Eliz.* 553. are theſe: A covenant lies againſt an executor in every caſe, altho' he be not named; unleſs it be ſuch a covenant as is to be performed by the perſon of the teſtator, which they cannot perform.

But in the caſe of *K.* and *Eaſt-Bridgeford*, *T.* 12 *G.* 2. Upon a ſpecial order it was ſtated, that an apprentice upon the death of his maſter, was with his own conſent turned over by the widow (who had taken no adminiſtration) to another maſter whom he ſerved. And the court held it a good ſettlement in the laſt pariſh, within the reaſon of thoſe caſes, where an apprentice was bound to a perſon in one pariſh, but with the maſter's conſent ſerved with another perſon in another pariſh, and there gained a ſettlement. *Strange* 1155.

XI. Apprentices ſetting up their trades.

By the common law, no man may be prohibited to work in any lawful trade, or in more trades than one, at his pleaſure. 11 *Co.* 53.

So that without an act of parliament no man may be reſtrained, either to work in any lawful trade, or to uſe divers miſteries or trades; therefore an act of parliament made to reſtrain any perſon herein,

herein, muſt be taken ſtrictly, and not favourably as acts made in affirmance of the common law.

The reſtraining clauſe in the ſtatute of 5 *El. c.* 4. is as follows: *It ſhall not be lawful to any perſon, to ſet up, occupy, uſe, or exerciſe, any craft, miſtery, or occupation now uſed or occupied within the realm of* England *or* Wales, *except he ſhall have been brought up therein ſeven years at the leaſt as an apprentice by this ſtatute, nor to ſet any perſon on work therein, except he ſhall have been apprentice as aforeſaid, or elſe having ſerved as an apprentice will become a journeyman, or hired by the year; on pain of* 40 s. *a month, half to the king, and half to him that ſhall ſue in the ſeſſions, or other court of record; or if it is in a town corporate, then to be diſpoſed of as other fines by the charter.* ſ. 31.

It ſhall not be lawful] This is a negative clauſe, and no one ſhall exerciſe a trade againſt it, unleſs by virtue of a cuſtom, as the widows of tradeſmen, who by cuſtom carry on the trade of their huſbands, which the court held not to be within this ſtatute. 2 *Salk.* 610.

To any perſon] But by the 15 *C.* 2. *c.* 15. Hemp workers of all kinds, net makers, and makers of tapeſtry hangings are excepted; who may ſet up without having ſerved ſeven years.

And by 22 *G.* 2. *c.* 44. All officers, mariners, and ſoldiers, who have been employed in his majeſty's ſervice, and not deſerted, may exerciſe ſuch trades as they are apt for, in any town or place.

And by 6 & 7 *W. c.* 18. An apprentice diſcovering two offenders guilty of coining, ſo as they be convicted, ſhall be deemed a freeman, and may exerciſe his trade as if he had ſerved out his time. *ſ.* 12.

To ſet up, occupy, uſe, or exerciſe] *T.* 3 *W. Hobbs* and *Young.* Exerciſing a trade by others who have ſerved ſeven years is within the ſtatute; for he that hath not ſerved an apprenticeſhip is thereby reſtrained to work as a trader, either by himſelf or others; for the intent of the act is, to annex the benefit of trade to ſuch as underwent the hardſhip of learning it, thereby to encourage labour in youth: And few would undergo the trouble of being apprentices, if they might employ others to work for them. 2 *Salk.* 610.

If a man uſe the trade of a tallow chandler, baker, brewer, or any other lawful trade, or manual occupation, for his own uſe, or for the uſe of his family, without ſelling any for lucre and gain, he may lawfully do it; but he cannot retain any apprentice therein; but he may hire one to be his ſervant, who is ſkilful in that trade or occupation. 8 *Co.* 129.

Now uſed] That is, on the 12th of *Jan.* 1562, when that parliament began; and this reſtraint ſhall not extend any further, than the words do expreſly direct, and therefore not to new arts and miſteries ſince invented. 1 *Roll's Rep.* 10. 1 *Ventr.* 326, 346.

Within

Within the realm of England *and* Wales] *M.* 1 *G.* 2. *K.* and *Lister.* Indictment for using the trade of a dry salter, being a craft, mistery, or occupation used *in this kingdom* on the 12th day of *Jan.* in the 5th year of *Eliz.* Which the court held to be ill; for that the words *in this kingdom* tie down the indictment to the kingdom of *Great Britain*, as it is at this day; whereas it should have been *in England*, or *in England and Wales.* Sess. C. V. 2. 160. Strange 788.

Except he shall have been brought up therein seven years] *E.* 11 *W. K.* and *Fox.* Indictment for using the trade of a taylor, not having served seven years, was quashed, because it said only, not having served as an apprentice within *England* or *Wales*; for it may be he did so beyond sea, and if it were any where it sufficeth. 1 *Salk.* 67.

As an apprentice] *E.* 5 *An. Q.* and *Madlox.* By the court; Upon indictment on this statute, in evidence we allow following the trade for seven years to be sufficient, without any binding, this being an hard law. 2 *Salk.* 613.

Or else having served as an apprentice, will become a journeyman] *M.* 26 *C.* 2. *K.* and *Moor.* The defendant was indicted for using the trade of a weaver, not having served as an apprentice seven years; the evidence was, he served six as an apprentice, and had since as journeyman in the same trade worked above that time: And by the court, the serving of seven years is sufficient either way; and the defendant was found not guilty. 3 *Keb.* 400.

A. Indenture of a parish apprentice; on 43 *El. c.* 2. *s.* 1, 5.

THIS *indenture made the* ——— *day of* ——— *in the year of our lord* ——— *Between* A. B. *and* C. D. *churchwardens, and* E. F. *and* G. H. *overseers of the poor of the parish of* ——— *in the county of* ——— *of the one part, and* A. M. *of* ——— *in the said parish, shoemaker, of the other part, witnesseth, that the said churchwardens and overseers of the poor, by and with the consent of* ——— *two of his majesty's justices of the peace for the said county, dwelling near to* [or, *in*] *the said parish of* ——— *one whereof is of the* quorum, *have by these presents put, placed, and bound* A. P. *a poor boy, whose parents* B. P. *and* C. P. *are not able to maintain him, of the age of* ——— *years, to be an apprentice with him the said* A. M. *and as an apprentice with him the said* A. M. *to dwell, from the date of these presents, until the said* A. P. *shall come to the age of twenty-four years* [or, if a female, *until the said* A. P. *shall come to the age of twenty-one years, or the time of her marriage, which shall first happen*] *according to the statutes in such case made and provided. By and during all which time and term, the said* A. P. *shall the said* A. M. *his said master well and faithfully serve, in all such lawful business as the said* A. P. *shall be put*

put unto by the command of his ſaid maſter, according to the power, wit, and ability of him the ſaid A. P. *and honeſtly and obediently in all things ſhall behave himſelf towards his ſaid maſter, and honeſtly and orderly towards the reſt of the family of the ſaid* A. M. *And the ſaid* A. M. *for his part, for himſelf, his executors and adminiſtrators, doth hereby promiſe and covenant, to and with the ſaid churchwardens and overſeers of the poor, for them and their ſucceſſors, and for the ſaid* A. P. *that he the ſaid* A. M. *ſhall the ſaid* A. P. *in the craft, miſtery, and occupation of a ſhoemaker, which he the ſaid* A. M. *now uſeth, after the beſt manner that he can or may, teach, inſtruct, and inform, or cauſe to be taught, inſtructed, and informed, as much as thereunto belongeth, or in any wiſe appertaineth; And that the ſaid* A. M. *ſhall alſo during all the ſaid term find and allow unto the ſaid apprentice ſufficient meat, drink, apparel, waſhing, lodging, and all other things needful or meet for an apprentice, in ſuch manner that the ſaid apprentice ſhall not at any time during the ſaid term, be in any wiſe a charge to the ſaid pariſh or the pariſhoners thereof. In witneſs whereof the ſaid parties have hereunto ſet their hands and ſeals, the day and year firſt above written.*

Where the overſeers and the maſter can agree, other covenants may be inſerted, according to ſuch agreement; but if the maſter is to be compelled, it ſeemeth not ſafe to require more from him by the indenture than is above expreſſed.

The aſſent of two juſtices.

WE ——— *two of his majeſty's juſtices of the peace for the abovementioned county of* ——— *dwelling near to the abovementioned pariſh of* ——— *and one of us of the* quorum, *do hereby declare our aſſent to the binding the abovenamed* A. P. *an apprentice to the abovenamed* A. M. *according to the form and effect of the abovewritten indenture. Given under our hands the* ——— *day of* &c.

B. Warrant to levy 10*l.* for not receiving a poor apprentice; on the ſtatute of 8 & 9 *W.*

Weſtmorland { To the conſtables of ———

WHEREAS A. B. *and* C. D. *churchwardens, and* E. F. *and* G. H. *overſeers of the poor of the pariſh of* ——— *in the ſaid county, by the aſſent of* [*us*] ——— *two of his majeſty's juſtices of the peace for the ſaid county, dwelling near to* [or, *in*] *the ſaid pariſh of* ——— *one whereof is of the* quorum, *did endeavour to bind* A. P. *a poor male child of the ſaid pariſh, whoſe parents*

parents are not able to maintain him, apprentice to A. M. *of* ——— *in the ſaid pariſh, taylor, and for that intent did prepare and duly perfect one pair of indentures purſuant to the ſtatute in ſuch caſe made and provided, which ſaid pair of indentures was ſigned and confirmed by* [*us*] *the ſaid two juſtices: And whereas it hath been duly proved before us, as well upon the oath of the ſaid* A. B. *as otherwiſe, that the ſaid* A. M. *hath refuſed, and doth refuſe, to receive and provide for the ſaid* A. P. *as an apprentice, and alſo to execute another part of the ſaid indentures, being duly tendred to him by the ſaid churchwardens and overſeers of the poor, whereby the ſaid* A. M. *hath forfeited the ſum of ten pounds: Theſe are therefore, in his ſaid majeſty's name, to require and command you, to make diſtreſs of the goods and chattels of him the ſaid* A. M. *and if within the ſpace of* [*ſix*] *days next after ſuch diſtreſs by you made, the ſaid ſum of* 10 l. *together with reaſonable charges of taking and keeping the ſaid diſtreſs, ſhall not be paid, that then you do ſell the ſaid goods and chattels ſo by you diſtrained, and out of the money ariſing by ſuch ſale, pay the ſaid ſum of* 10 l. *to the overſeers of the poor of the ſaid pariſh of* ——— *where the ſaid offence was committed, for the uſe of the poor of the ſaid pariſh; returning the overplus upon demand unto him the ſaid* A. M. *the reaſonable charges of taking, keeping, and ſelling the ſaid diſtreſs being thereout firſt deducted. Provided always, that if the ſaid* A. M. *ſhall think himſelf aggrieved with this our adjudication, award, and warrant, and ſhall appeal therefrom to the next general or quarter ſeſſions of the peace for the ſaid county, that then you ſuſpend and forbear the ſale of ſuch diſtreſs till further order ſhall be made in the premiſſes upon the appeal of the ſaid* A. M. *to the ſaid ſeſſions of the peace. Given under our hands and ſeals the* ——— *day of* &c.

C. Warrant againſt the maſter for miſuſing his apprentice; on 5 *El. c.* 4.

Weſtmorland. { To the conſtables of ———.

WHEREAS *complaint hath been duly made unto me* ——— *one of his majeſty's juſtices of the peace in and for the ſaid county, by* A. P. *apprentice to* A. M. *of* ——— *in the ſaid county, ſhoemaker, that the ſaid* A. M. *hath miſuſed and evil intreated him the ſaid* A. P. *by cruel puniſhment, and beating him the ſaid* A. P. *without juſt cauſe, and by not allowing unto him ſufficient meat, drink, apparel,* [or as the caſe ſhall be] *Theſe are therefore in his majeſty's name to command you to cauſe the ſaid* A. M. *perſonally to appear before me at the houſe of* ——— *in the ſaid county, on* ——— *the* ——— *day of* ——— *at the hour of* ——— *in the afternoon of the ſame day, to anſwer unto the ſaid complaint; and alſo to cauſe the ſaid apprentice to appear before me at the ſame time and place, to make good his ſaid complaint. Herein fail not. Given under my hand and ſeal the* ——— *day of* &c.

D. Warrant

D. Warrant against the apprentice, on complaint of the master; on the 5 *El. c.* 4.

Westmorland. { To the constables of ———.

WHEREAS *complaint hath been duly made unto me* ——— *one of his majesty's justices of the peace in and for the said county, by* A. M. *of* ——— *in the said county, husbandman, that* A. P. *now being an apprentice to him the said* A. M. *is negligent, stubborn, disorderly, and doth not his duty to him the said* A. M. *his master; These are therefore to command you to bring the said apprentice before me, and to give notice to the said master that he appear before me at the same time, that such order may be taken in the premisses, as equity shall require. Herein fail not. Given under my hand and seal the* ——— *day of* &c.

E. Order of discharge by four justices at the sessions; on the 5 *El. c.* 4. *s.* 35.

Westmorland. AT *a general quarter sessions of the peace, holden at* ——— *in and for the county aforesaid, the* ——— *day of* ——— *in the* ——— *year of the reign of our lord* George *the second, by the grace of god of* Great Britain, France, *and* Ireland, *king, defender of the faith, and so forth; Before* ——— *justices of our said lord the king assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, and of the* quorum, *It is ordered as followeth;*

Upon the petition of A. P. *apprentice to* A. M. *of* ——— *in the said county, husbandman, to be relieved upon certain neglects of the said master in instructing him in his trade, and in misusing and evil intreating the said apprentice by cruel punishment* [or as the case shall be]; *And the said master having likewise appeared upon his recognizance taken before* J. P. *esquire, one of the said justices, to answer to the complaint of the said petition, and having proved nothing whereby to clear himself of the said complaint; but on the contrary, the said* A. P. *having given full proof of the truth of the said complaint to the satisfaction of the said court: We therefore, whose hands and seals are hereunto set, being four of the said justices, and of the* quorum, *do hereby order, pronounce, and declare, that the said apprentice shall be, and is hereby discharged and freed from his said apprenticeship; and that the said master shall pay and restore to the said apprentice the sum of* ——— *being part of the sum of* ——— *which he the said master had with the said apprentice upon his binding: And this to be a final order betwixt the said master and apprentice, any thing contained in their indentures of apprenticeship, or otherwise, to the contrary notwithstanding. Given under our hands and seals the day and year first above written.*

F. Complaint

F. Complaint of an apprentice to two juſtices againſt his maſter; on 20 *G.* 2. *c.* 19.

Weſtmorland. THE *information and complaint of* A. P. *apprentice to* A. M. *of* ——— *in the ſaid county, huſbandman, taken and made* [*on oath*, if he is above 14 years of age] *before us two of his majeſty's juſtices of the peace in and for the ſaid county, the* ——— *day of* ——— *in the year* &c.

Who ſaith, that he the ſaid A. P. *about a year and a half ago laſt paſt, became bound an apprentice by indenture to* A. M. *of* ——— *aforeſaid, huſbandman; that at ſeveral times, ſince he entred upon the ſaid apprenticeſhip, the ſaid* A. M. *hath miſuſed and ill treated him the ſaid apprentice, and particularly* [as the caſe ſhall be].

A † P
his mark.

Taken and ſigned the day and year above; before us

J. P.
K. P.

G. Summons of the maſter by two juſtices, on complaint of the apprentice; on the 20 *G.* 2. *c.* 19. *ſ.* 3.

Weſtmorland. { To the conſtable of ———.

WHEREAS *complaint hath been made unto us* ——— *two of his majeſty's juſtices of the peace in and for the ſaid county, by* A. P. *apprentice to* A. M. *of* ——— *in the ſaid county, huſbandman, that he the ſaid* A. M. *hath miſuſed and ill treated him the ſaid* A. P. *and particularly* [as the caſe ſhall be]: *Theſe are therefore to require you to ſummon the ſaid* A. M. *to appear before us at* ——— *in the ſaid county, on* ——— *the* ——— *day of* ——— *to anſwer unto the ſaid complaint; and alſo that you give notice unto him, to bring with him the indenture of apprenticeſhip between him and his ſaid apprentice; and alſo that you bring before us at the ſame time and place the ſaid* A. P. *to make good the ſaid complaint; and alſo that you bring with you this precept, and certify unto us then and there what you ſhall have done in the execution thereof. Given under our hands and ſeals the* ——— *day* &c.

H. Discharge of an apprentice by two justices, on the master's misusing him; by the 20 *G.* 2. *c.* 19. *s.* 3.

Westmorland. WHEREAS *complaint hath been made before us* ——— *two of his majesty's justices of the peace in and for the said county, by* A. P. *apprentice to* A. M. *of* ——— *in the said county, taylor, that he the said* A. M. *hath misused and ill treated him the said apprentice* [*and particularly*, as the case shall be]; *And whereas the said* A. M. *hath appeared before us in pursuance of our summons to that purpose, but hath not cleared himself of and from the said accusation and complaint, but on the contrary the said* A. P. *hath made full proof of the truth thereof before us upon oath; We therefore by these presents do discharge him the said* A. P. *of and from his apprenticeship to the said* A. M. *any thing in the indenture of apprenticeship made betwixt them, or otherwise howsoever, to the contrary notwithstanding. Given under our hands and seals the* ——— *day of* &c.

[Or, *And whereas it hath been duly proved before us, as well upon the oath of* A. C. *constable of* ——— *aforesaid, as otherwise, that he the said* A. C. *did duly summon the said* A. M. *to appear before us at a reasonable time in the said summons mentioned and specified; but notwithstanding the same, he the said* A. M. *hath not appeared before us according to such summons: We therefore, having duly examined into the matter of the said complaint, and the truth thereof having been fully proved before us upon oath, do discharge* &c.]

I. Complaint to two justices of the master against his apprentice; on the 20 *G.* 2. *c.* 19. *s.* 4.

Westmorland. THE *complaint and information of* A. M. *of* ——— *in the said county, husbandman, taken on oath before us* ——— *two of his majesty's justices of the peace in and for the said county, the* ——— *day of* ———.

Who saith, that A. P. *having been bound to him an apprentice by indenture bearing date the* ——— *day* &c. *and having entred upon his apprenticeship accordingly, hath been refractory and disobedient to him the said* A. M. [and particularly as the case shall be.]

Taken the day and year above, before us — A. M.

J. P.
K. P.

K. Warrant

K. Warrant for a diſorderly apprentice, by two juſtices; on the 20 *G.* 2. *c.* 19. *ſ.* 4.

Weſtmorland. { To the conſtable of ———.

WHEREAS *oath hath been made before us* ——— *two of his majeſty's juſtices of the peace in and for the ſaid county, by* A. M. *of* ——— *in the ſaid county, huſbandman, that* A. P. *apprentice to the ſaid* A. M. *hath committed divers miſdemeanors againſt the ſaid* A. M. *his maſter, and hath likewiſe run away from his ſaid maſter; Theſe are therefore to require you forthwith to apprehend the ſaid* A. P. *and bring him before us, to anſwer unto the ſaid complaint, and to be dealt with according to law: And you are to give notice to the ſaid* A. M. *that he appear before us at the ſame time, to make good the ſaid complaint. Given under our hands and ſeals* &c.

L. Commitment of an apprentice to the houſe of correction, on complaint of his maſter, by two juſtices; on the 20 *G.* 2. *c.* 19. *ſ.* 4.

Weſtmorland. { To the conſtable of ——— in the ſaid county, and to the keeper of the houſe of correction at ——— in the ſaid county.

WHEREAS *complaint hath been made before us* ——— *two of his majeſty's juſtices of the peace in and for the ſaid county, upon the oath of* A. M. *of* ——— *in the ſaid county, huſbandman, that* A. P. *apprentice of the ſaid* A. M. *hath committed divers miſdemeanors againſt him the ſaid* A. M. *his maſter; And whereas upon examination thereof, and upon hearing the allegations of both parties having come before us for that purpoſe, and upon due conſideration had thereof, we have adjudged, and do hereby adjudge the ſaid complaint to be true: We do therefore hereby command you the ſaid conſtable, to take and convey the ſaid* A. P. *to the ſaid houſe of correction, and to deliver him to the ſaid keeper thereof, together with this warrant: And we do hereby command you the ſaid keeper of the ſaid houſe of correction, to receive the ſaid* A. P. *into your cuſtody in the ſaid houſe of correction, there to remain and be corrected, and held to hard labour for the ſpace of* ——— *from the date hereof. Given under our hands and ſeals the* ——— *day* &c.

M. Discharge of an apprentice by two justices, on complaint of the master; by 20 *G.* 2. *c.* 19. *s.* 4.

Westmorland. WHEREAS *complaint* &c. (as in the last precedent) — *We do therefore by these presents discharge the said* A. P. *from his apprenticeship to the said* A. M. *any thing in any indenture or indentures of apprenticeship betwixt them, or otherwise, to the contrary notwithstanding.* *Given* &c.

Approver.

AN *approver* (probator) is a person indicted of treason or felony, and in prison for the same, who upon his arraignment, before any plea pleaded, doth confess the indictment, and takes a corporal oath to reveal all treasons and felonies that he knoweth of, and therefore prays a coroner, before whom he is to enter his appeal or accusation, against those that are partners in the crime contained in the indictment. 3 *Inst.* 129.

This accusation of himself, and oath, makes his accusation of another person of the same crime to amount to an indictment; and if his partners are convicted, he shall have his pardon of course. 3 *Inst.* 129, 130.

But justices of the peace cannot take cognizance hereof, because they have no authority by their commission to assign a coroner. 3 *Inst.* 130.

And besides, as it is in the discretion of the court, whether they will suffer one to be an approver, this method of late hath been seldom practised: And in many cases we have what seems to amount to the same, by statute; where pardon is assured to offenders, on discovering and convicting their accomplices.

Aqua Vitae. See Excise.
Arbitration. See Award.
Armour embezzling. See Stores.
Armour popish. See Popery.
Armour seizing. See Affray.
Army. See Soldiers and Militia.
Arrack. See Excise.

Arraignment.

WHEN an offender comes into court, or is brought in by proceſs, ſometimes of *capias*, and ſometimes of *habeas corpus* directed to the gaoler of another priſon; the firſt thing that follows thereupon, is his arraignment. 2 *H. H.* 216.

Now arraignment is nothing elſe but the calling of the offender to the bar of the court, to anſwer the matter charged upon him. 2 *H. H.* 216.

And the word in latin is no other than *ad rationem ponere*, and in french *ad reſon*, or abbreviated *a reſn*; for as the ancient word *diſrain* or *derayn* imports in latin *diſrationare*, to diſprove or evince the contrary of any thing that is or may be affirmed, ſo *arraigne* is *ad rationem ponere*, to call to account or anſwer. 2 *H. H.* 216.

The priſoner on his arraignment, tho' under an indictment of the higheſt crime, muſt be brought to the bar without irons and all manner of ſhackles or bonds, unleſs there be a danger of eſcape, and then he may be brought with irons. 2 *H. H.* 219.

Alſo there is no neceſſity that a priſoner, at the time of his arraignment, hold up his hand at the bar, or be commanded ſo to do; for this is only a ceremony for making known the perſon of the offender to the court; and if he anſwers that he is the ſame perſon, it is all one. 2 *Haw.* 308.

Arreſt.

THIS is to be underſtood of arreſts in criminal caſes only, and not in civil caſes.

The word *arreſt* is the ſame, with very little variation, in the *Engliſh*, *French*, *German*, *Belgick*, and other languages of the weſtern empire, heretofore ſubject to the *Roman* power; and probably may have been derived unto us through the channels both of *France* and *Saxony:* the *French arreſter* ſignifieth to ſtop or ſtay; and the *Saxon reſtan*, to reſt; and both perhaps have ſprung from the *Italian arreſto*, and that from the well known *Latin* verb *ſto*, to ſtand. Arreſt, what.

And, in law, an arreſt doth ſignify the reſtraint of a man's perſon, depriving him of his own will and liberty, and binding him to become obedient to the will of the law: And it may be called the beginning of impriſonment. *Lamb.* 93.

Concerning which I will ſhew,

I. Who may or may not be arreſted.

II. For what cauſes of ſuſpicion an arreſt may be.

III. By whom the arreſt ſhall be made.
IV. The manner of an arreſt.
V. What is to be done after the arreſt.

I. Who may or may not be arreſted.

Privilege of parliament.

1. Generally, a member of parliament ſhall have the privilege of parliament for himſelf and his ſervants to be freed from arreſts: but for treaſon, felony, and breach of the peace there can be no privilege. 4 *Inſt.* 24, 25.

Peers and bodies corporate.

2. In caſes of peers and corporations, the proceſs is a *diſtringas*, for they cannot be arreſted. 3 *Salk.* 46.

In churchyards.

3. None ſhall arreſt prieſts or their clerks, or other perſons of holy church, whilſt they attend to divine ſervice, in churches, churchyards, or other places dedicated to god; on pain of impriſonment and ranſom at the king's will, and he ſhall alſo make gree to the parties arreſted. 50 *Ed.* 3. *c.* 5. 2 *R.* 2. *c.* 15.

On Sundays.

4. Alſo a warrant executed againſt any perſon whatſoever, on the lord's day, is void; and the perſons ſerving the ſame ſhall ſuffer damages, as if they had done the ſame without warrant, except in caſes of treaſon, felony, and breach of the peace. 29 *C.* 2. *c.* 7. *ſ.* 6.

II. For what cauſes of ſuſpicion an arreſt may be.

Suſpicion.

By the ſtatute of 34 *Ed.* 3. *c.* 1. Power is given to the juſtices of the peace, to arreſt all thoſe, whom they find by indictment, or by *ſuſpicion*, and to put them in priſon.

Cauſes of ſuſpicion:

And the cauſes of ſuſpicion, which are generally agreed to juſtify the arreſt of an innocent perſon for felony, are theſe that follow;

Common fame.

(1) The common fame of the country; but it ſeems, that it ought to appear upon evidence, in an action brought for ſuch arreſt, that ſuch fame had ſome probable ground. 2 *Hawv.* 76.

Circumſtances of guilt.

(2) The being found in ſuch circumſtances, as induce a ſtrong preſumption of guilt; as coming out of a houſe wherein murder hath been committed, with a bloody knife in one's hand; or being found in poſſeſſion of any part of goods ſtolen, without being able to give a probable account of coming honeſtly by them. 2 *Hawv.* 76.

Flight.

(3) The behaving one's ſelf in ſuch a manner as betrays a conſciouſneſs of guilt; as where a man accuſed of felony, on hearing that a warrant is taken out againſt him, doth abſcond. 2 *Hawv.* 76.

But the party who flies from an arreſt for a capital offence, is not thereby guilty of a capital offence, but only liable to forfeit his goods, when ſuch flight is found againſt him. 2 *Hawv.* 122.

Evil company.

(4) The being found in company with one known to be an offender, at the time of the offence; or generally at other times keeping

keeping company with perſons of ſcandalous reputation. 2 *Haw.* 76. 2 *Inſt.* 52.

(5) The living an idle, vagrant, and diſorderly life, without having any viſible means to ſupport it. 2 *Haw.* 76. Living idle.

(6) The being purſued by hue and cry. 2 *Haw.* 76. Hue and cry.

For if a felony is done, and one is purſued upon hue and cry, that is not of ill fame, ſuſpicious, unknown, nor indicted; he may be attached and impriſoned by the law of the land. 2 *Inſt.* 52.

But generally, no ſuch cauſe of ſuſpicion, as any of the above-mentioned, will juſtify an arreſt, where in truth no ſuch crime hath been committed; unleſs it be in the caſe of hue and cry. 2 *Haw.* 76. Where no crime is committed.

III. By whom the arreſt ſhall be made.

1. In criminal caſes, a perſon may be apprehended and reſtrained of his liberty, not only by proceſs out of ſome court, or warrant from a magiſtrate, but frequently by a conſtable, watchman, or private perſon, without any warrant or precept. Arreſt without warrant:

2. Thus all perſons, who are preſent when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and impriſoned for their neglect. 2 *Haw.* 74. By private perſons.

Alſo, every private perſon is bound to aſſiſt an officer demanding his help, for the taking of a felon, or the ſuppreſſing of an affray. 2 *Haw.* 75.

Alſo by the vagrant act of 17 *G.* 2. Every private perſon may apprehend beggars and vagrants.

3. Alſo, a watchman may arreſt a night walker, without any warrant from a magiſtrate. 2 *Inſt.* 52. By watchmen.

4. In like manner, a conſtable may *ex officio* arreſt a breaker of the peace in his view, and keep him in his houſe, or in the ſtocks, till he can bring him before a juſtice. 1 *H. H.* 587. By conſtables.

5. Or any perſon whatſoever, if an affray be made to the breach of the king's peace, may without any warrant from a magiſtrate, reſtrain any of the offenders, to the end the king's peace may be kept; but after the affray is ended, they cannot be arreſted without an expreſs warrant. 2 *Inſt.* 52. By any perſon whatſoever.

6. So much concerning an arreſt without a warrant; next follows arreſting with ſuch warrant. Arreſt with warrant:

7. The warrant is ordinarily directed to the ſheriff or conſtable, and they are indictable, and ſubject thereupon to a fine and impriſonment, if they neglect or refuſe it. 1 *H. H.* 581. By the ſheriff or conſtable.

8. If it be directed to the ſheriff, he may command his bailiff, under-ſheriff, or other ſworn and known officer, to ſerve it, without writing any precept. But if he will command another man, that is no ſuch officer, to ſerve it, he muſt give him a written precept, otherwiſe, falſe impriſonment will lie. *Lamb.* 89. Sheriff may depute.

9. But every other perſon, to whom it is directed, muſt perſonally execute it; yet it ſeems, that any one may lawfully aſſiſt him. 2 *Haw.* 86. Others cannot depute.

Where a constable may execute it out of his own district.

10. If a warrant be generally directed to all constables, no one can execute it out of his own precinct; for in such case it shall be taken respectively to each of them within their several districts, and not to one of them to execute it within the district of another: but if it be directed to a particular constable (Mr. *Hawkins* says, to a particular constable *by name*), he may execute it any where within the jurisdiction of the justice, but is not compellable to execute it out of his own constablewick. Lord *Raym.* 546. 1 *H. H.* 581. 2 *H. H.* 110. 2 *Haw.* 86.

Any person may execute.

11. The justice that issues the warrant, may direct it to a private person if he pleaseth, and it is good; but he is not compellable to execute it, unless he be a proper officer. 1 *H. H.* 581.

But not to be directed to the party.

12. But by the justices oath, the warrant ought not to be directed to the party, but to some indifferent person, to execute it.

Where directed to two jointly.

13. If a warrant is directed to two or more jointly, yet any one of them alone may execute it. *Dalt. c.* 169.

IV. The manner of an arrest.

To be gone about immediately.

1. The officer to whom a warrant is directed and delivered, ought with all speed and secrecy to find out the party, and then to execute the warrant. *Dalt. c.* 169.

Opposing the execution.

2. It is certainly an offence of a very high nature, to oppose one who lawfully endeavours to arrest another for treason or felony: And it seems, that the person who so opposes an arrest for treason, whereof he knows the party to have been guilty, is thereby guilty of the treason; and that he who so opposes an arrest for felony, is an accessary to the felony. 2 *Haw.* 121.

Arresting in the night.

3. An arrest in the night is good, both at the suit of the king and of the subject; else the party may escape. 9 *Co.* 66.

Arresting in another county.

4. By the 24 *G.* 2. *c.* 55. Constables and others may, on having the warrant indorsed by a justice in another county, into which an offender shall have escaped, arrest an offender in such other county, and carry him before a justice in such other county, if the offence is bailable, to find bail; or else shall carry him back again before a justice in the county from whence the warrant did first issue.

Taking the power of the county.

5. A private person cannot raise power to arrest or detain a felon. 1 *H. H.* 601.

But any justice, or the sheriff, may take of the county any number that he shall think meet, to pursue, arrest, and imprison traitors, murderers, robbers, and other felons; or such as do break, or go about to break, or disturb the king's peace: and every man being required, ought to assist and aid them, on pain of fine and imprisonment. *Dalt. c.* 171.

But it is not justifiable for a justice, sheriff, or other officer, to assemble the *posse comitatus*, or raise a power or assembly of people, upon their own heads, without just cause. *Dalt. c.* 171.

But where a justice, sheriff, or other officer, is enabled to take the power of the county, it seemeth they may command, and ought to have the aid and attendance of all knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants, and apprentices,

tices, and of all other perſons being above the age of fifteen years, and able to travel. *Dalt. c.* 171. Becauſe, by the ſtatute of *Wincheſter*, all of that age are bound to have harneſs.

But women, eccleſiaſtical perſons, and ſuch as be decrepit, or diſeaſed, ſhall not be compelled to attend them. *Dalt. c.* 171.

And in ſuch caſe it is referred to the diſcretion of the juſtice, ſheriff, or other officer, what number they will have to attend on them, and how and after what manner they ſhall be armed or otherwiſe furniſhed. *Dalt. c.* 171.

6. As to the caſe of breaking open doors, in order to apprehend offenders, it is to be obſerved, that the law doth never allow of ſuch extremities but in caſes of neceſſity; and therefore, that no one can juſtify the breaking open another's doors to make an arreſt, unleſs he firſt ſignify to thoſe in the houſe the cauſe of his coming, and requeſt them to give him admittance. 2 *Haw.* 86. Breaking open doors.

But where a perſon authorized to arreſt another, who is ſheltred in a houſe, is denied quietly to enter into it, in order to take him; it ſeems generally to be agreed, that he may juſtify breaking open the doors in the following inſtances:

(1) Upon a *capias* grounded on an indictment for any crime whatſoever; or upon any *capias* from the chancery or king's bench, to compel a man to find ſureties for the peace or good behaviour. 2 *Haw.* 86.

(2) Where one known to have committed a treaſon or felony, or to have given another a dangerous wound, is purſued either with or without a warrant, by a conſtable or private perſon; but where one lies under a probable ſuſpicion only, and is not indicted, it ſeems the better opinion at this day (Mr. *Hawkins* ſays) that no one can juſtify the breaking open doors in order to apprehend him: (And this opinion he founds on *Coke's* 4 *Inſt.* 177. and *Hale's pleas of the crown* 91.) 2 *Haw.* 87.

But Lord *Hale*, in his hiſtory of the pleas of the crown, ſays, that upon a warrant for probable cauſe of ſuſpicion of felony, the perſon to whom ſuch warrant is directed, may break open doors to take the perſon ſuſpected, if upon demand he will not ſurrender himſelf, as well as if there had been an expreſs and poſitive charge againſt him; and ſo (he ſays) hath the common practice obtained, notwithſtanding the contrary opinion of Lord *Coke:* for in ſuch caſe the proceſs is for the king, and therefore a *non omittas* is implied. 1 *H. H.* 580, 583. 2 *H. H.* 117.

And as he may break open ſuch perſon's own houſe, ſo much more may he break open the houſe of another to take him; for ſo the ſheriff may do upon a civil proceſs: But then he muſt at his peril ſee that the felon be there; for if the felon be not there, he is a treſpaſſer to the ſtranger whoſe houſe it is. 2 *H. H.* 117.

But it ſeems that he that arreſts as a *private man* barely upon ſuſpicion of felony, cannot juſtify the breaking open of doors to arreſt the party ſuſpected, but he doth it at his peril, that is, if in truth he be a felon, then it is juſtifiable, but if he be innocent, but upon a reaſonable cauſe ſuſpected, it is not juſtifiable. 1 *H. H.* 82.

But

But a *conſtable* in ſuch caſe may juſtify, and the reaſon of the difference is this: becauſe that in the former caſe it is but a thing permitted to private perſons to arreſt for ſuſpicion, and they are not puniſhable if they omit it, and therefore they cannot break open doors; but in caſe of a conſtable, he is puniſhable if he omit it upon complaint. 2 *H. H.* 92.

(3) Upon a warrant from a juſtice of the peace, to find ſureties for the peace or good behaviour. 2 *Haw.* 86. 1 *H. H.* 582. 2 *H. H.* 117.

And in general, Mr. *Dalton* ſays, an officer upon any warrant from a juſtice, either for the peace or good behaviour, or in any caſe where the king is a party, may by force break open a man's houſe, to arreſt the offender. *Dalt. c.* 169.

(4) On a warrant to ſearch for ſtolen goods, the doors may be broken open, if the goods are there; and if they are not there, the conſtable ſeems indemnified, but he that made the ſuggeſtion, is puniſhable. 2 *H. H.* 151.

(5) Where forcible entry or detainer is found by inquiſition before juſtices of the peace, or appears on their view. 2 *Haw.* 86.

(6) On a *capias utlagatum*, or *capias pro fine*. 2 *Haw.* 86.

(7) On the warrant of a juſtice of the peace for the levying of a forfeiture, in execution of a judgment, or conviction for it, grounded on any ſtatute, which gives the whole or any part of ſuch forfeiture to the king. 2 *Haw.* 86.

(8) Where an affray is made in an houſe, in the view or hearing of the conſtable, he may break open the doors to take them. 1 *Haw.* 137. 2 *Haw.* 87.

(9) If there be diſorderly drinking or noiſe in a houſe, at an unſeaſonable time of night, eſpecially in inns, taverns, or alehouſes, the conſtable or his watch, demanding entrance, and being refuſed, may break open the doors, to ſee and ſuppreſs the diſorder. 2 *H. H.* 95.

(10) Wherever a perſon is lawfully arreſted for any cauſe, and afterwards eſcapes, and ſhelters himſelf in an houſe. 2 *Haw.* 87.

But upon a general warrant, without expreſſing any felony, or treaſon, or ſurety of the peace, the officer cannot break open a door. 1 *H. H.* 584.

Neither ought doors to be broken open to take a perſon, who is required to take certain oaths by virtue of a ſtatute, becauſe in ſuch caſe the warrant is not grounded on a precedent offence. 2 *Haw.* 87. 12 *Co.* 131.

But if an officer, to ſerve any warrant, enters into a houſe, the doors being open, and then the doors are locked upon him, he may break them open in order to regain his liberty. 2 *Haw.* 87.

Killing in the arreſt or purſuit.

7. If there be a warrant againſt a perſon, for a treſpaſs or breach of the peace, and he flies and will not yield to the arreſt, or being taken makes his eſcape; if the officer kills him, it is murder. 2 *H. H.* 117.

But if ſuch perſon, either upon the attempt to arreſt, or after the arreſt, aſſault the officer, to the intent to make his eſcape from him, and the officer ſtanding upon his guard, kills him, this is no felony;

felony; for he is not bound to go back to the wall, as in common caſes of *ſe defendendo*, for the law is his protection. 2 *H. H.* 118.

But where a warrant iſſueth againſt a perſon for felony, and either before arreſt, or after, he flies and defends himſelf with ſtones or weapons, ſo that the officer muſt give over his purſuit, or otherwiſe cannot take him without killing him, if he kill him it is no felony. And the ſame law is, for a conſtable that doth it by virtue of his office, or on hue and cry. 2 *H. H.* 118.

But then there muſt be theſe cautions: 1. He muſt be a lawful officer; or there muſt be a lawful warrant. 2. The party ought to have notice of the reaſon of the purſuit, namely, becauſe a warrant is againſt him. 3. It muſt be a caſe of neceſſity, and that not ſuch a neceſſity as in the former caſe, where an aſſault is made upon the officer; but this is the neceſſity, namely, that he cannot otherwiſe be taken. 2 *H. H.* 119.

But tho' a private perſon may arreſt a felon, and if he fly ſo as he cannot be taken without he be killed, it is excuſable in this caſe for the neceſſity; yet it is at his peril, that the party be a felon; for if he be innocent of the felony, the killing (at leaſt before the arreſt) ſeems at leaſt manſlaughter; for an innocent perſon is not bound to take notice of a private perſon's ſuſpicion. 2 *H. H.* 119.

Whether the conſtable need to ſhew his warrant.

8. A conſtable ſworn and commonly known, and acting within his own precinct, need not ſhew his warrant; but he ought to acquaint the party with the ſubſtance of it. 2 *Haw.* 85.

And an officer giveth ſufficient notice what he is, when he ſaith to the party, I arreſt you in the king's name; and in ſuch caſe, the party at his peril ought to obey him, tho' he knoweth him not to be an officer; and if he have no lawful warrant, the party grieved may have his action of falſe impriſonment. *Dalt. c.* 169.

But the learned editor of *Hale*'s hiſtory obſerves hereupon, that the books referred to do intend the general warrant conſtituting ſuch perſon an officer, as a bailiff, or the like, in a civil action; tho' it may be otherwiſe in caſe of felony, becauſe in ſuch caſe a private perſon may arreſt a felon without any warrant at all. 2 *H. H.* 116.

But if he acts out of his precinct, or is not ſworn and commonly known, he muſt ſhew his warrant if demanded. 2 *Haw.* 85, 86. Otherwiſe the party may make reſiſtance, and needs not to obey it. *Dalt. c.* 169.

But if the conſtable has no warrant, but doth it by virtue of his office, as conſtable, it is ſufficient to notify that he is conſtable, or that he arreſts in the king's name. 1 *H. H.* 583.

But in the caſe of a warrant of diſtreſs, iſſued by a juſtice of the peace, for the levying a pecuniary forfeiture or ſum of money, it is ſpecially provided by the ſtatute of the 27 *G.* 2. *c.* 20. that the officer executing the ſame, ſhall, if required, ſhew his warrant to the perſon whoſe goods are diſtrained, and ſhall ſuffer a copy thereof to be taken.

No arreſt by words.

9. If the conſtable come unto the party, and require him to go before the juſtice, this is no arreſt or impriſonment. *Dalt. c.* 170.

For bare words will not make an arreſt, without laying hold on the perſon. 1 *Salk.* 79. 2 *Haw.* 129.

10. It

Retaking after arreſt.

10. It hath been holden, that if a conſtable, after he hath arreſted the party by force of a warrant, ſuffer him to go at large, upon his promiſe to come again and find ſureties, he cannot afterwards arreſt him by force of the ſame warrant: However if the party return, and put himſelf again under the cuſtody of the conſtable, it ſeems that it may be probably argued, that the conſtable may lawfully detain him, and bring him before the juſtice, in purſuance of ſuch warrant; but in this the law doth not ſeem to be clearly ſettled. 2 *Haw.* 81.

But if the party arreſted do eſcape, the officer upon freſh ſuit may take him again and again, ſo often as he eſcapeth, altho' he were out of view, or that he ſhall fly into another town or county. *Dalt. c.* 169.

V. What is to be done after the arreſt.

By a private perſon.

1. When a private perſon hath arreſted a felon, or one ſuſpected of felony, he may detain him in cuſtody till he can reaſonably diſmiſs himſelf of him; but with as much ſpeed as conveniently he can, he may do any of theſe three things:

(1) He may carry him to the common gaol; but that is now rarely done. 1 *H. H.* 589. 2 *H. H.* 77.

(2) He may deliver him to the conſtable, who may either carry him to gaol, or to a juſtice of the peace. 1 *H. H.* 589.

(3) He may carry him immediately to a juſtice of the peace. 1 *H. H.* 589.

By a watchman.

2. If the conſtable, or his watch, hath arreſted affrayers, or perſons drinking in an alehouſe diſorderly at an unſeaſonable time of night, he may put the perſons in the ſtocks, or in a priſon if there be one in the vill, till the heat of their paſſion or intemperance is over, tho' he deliver them afterwards; or till he can bring them before a juſtice. 2 *H. H.* 95.

By an officer by warrant.

3. If the arreſt is by virtue of a warrant, when the officer hath made the arreſt, he is forthwith to bring the party, according to the direction of the warrant: If it be to bring the party before the juſtice who granted the warrant ſpecially, then the officer is bound to bring him before the ſame juſtice; but if the warrant be to bring him before any juſtice of the county, then it is in the election of the officer, to bring him before what juſtice he thinks fit, and not in the election of the priſoner. 1 *H. H.* 582. 2 *H. H.* 112.

But if the time be unſeaſonable, as in or near the night, whereby he cannot attend the juſtice, or if there be danger of a preſent reſcue, or if the party be ſick, he may ſecure him in the ſtocks, or in an houſe, till the next day, or ſuch time as it may be reaſonable to bring him. 2 *H. H.* 120.

And when he hath brought him to the juſtice, yet he is in law ſtill in his cuſtody, till the juſtice diſcharge, or bail, or commit him. 2 *H. H.* 120.

Returning the warrant.

4. But it is ſaid, the conſtable is not obliged to return the warrant itſelf, but may keep it for his own juſtification, in caſe he ſhould

ſhould be queſtioned for what he had done; but only to return what he has done upon it. Lord *Raym.* 1196.

5. And this ſeems to be implied in the ſtatute of the 24 *G.* 2. *c.* 44. which enacteth, that no action ſhall be brought againſt any conſtable or other officer, or perſon acting by his order, and in his aid, for any thing done in obedience to the warrant of a juſtice of the peace, until demand hath been made, or left at the uſual place of his abode, by the party, or by his attorney, in writing, ſigned by the party demanding the ſame, of the peruſal and copy of ſuch warrant, and the ſame hath been refuſed or neglected for ſix days after ſuch demand: And if after compliance therewith, any ſuch action ſhall be brought, without making the juſtice who ſigned the warrant defendant, on producing and proving ſuch warrant at the trial, the jury ſhall give their verdict for the defendant. *ſ.* 6. And it is certain the conſtable cannot grant a peruſal or copy of the warrant, unleſs he hath it in his cuſtody. Conſtable indemnified.

6. By an ancient ſtatute, 27 *H.* 6. *c.* 10. No ſheriff ſhall take for any arreſt, but 20 *d.* and the bailiff which maketh the arreſt 4 *d.* on pain of 40 *l.* half to the king, and half to him that will ſue in ſeſſions (or the courts above) and treble damages to the party injured. Fee for an arreſt.

Upon which ſtatute perhaps may be founded the cuſtom in many places, of giving 4 *d.* to the conſtable with the warrant, for his trouble in executing the ſame: which indeed at that time might be a reaſonable ſatisfaction; for 4 *d.* then was worth more than ten times the value of 4 *d.* now. Which decreaſe in the value of money, in this and many other caſes depending upon ancient ſtatutes, may ſeem to require ſome conſideration.

The rewards for arreſting or apprehending highwaymen and others, may be found under their reſpective titles.

Arſon. See Burning.

Artificers. See Servants.

Assault and Battery.

I. Assault, what.
II. Battery, what.
III. In what cases they may be justified.
IV. How punished.

I. Assault, what.

ASSAULT, *assultus*, from the french *assayler*, is an attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at him with or without a weapon; or presenting a gun at him, at such a distance to which the gun will carry; or pointing a pitch fork at him, standing within the reach of it; or by holding up one's fist at him; or by any other such like act, done in an angry, threatning manner. 1 *Haw.* 133.

And from hence it clearly follows, that one charged with an assault and battery, may be found guilty of the assault, and yet acquitted of the battery: But every battery includes an assault; therefore on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient. 1 *Haw.* 134.

Notwithstanding the many ancient opinions to the contrary, it seems agreed at this day, that no words whatsoever can amount to an assault. 1 *Haw.* 134.

II. Battery, what.

Battery (from the Saxon *batte*, a club, or *beatan*, to beat, from whence cometh also the word *battle)* seemeth to be, when any injury whatsoever, be it never so small, is actually done to the person of a man, in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently justling him out of the way, and the like. 1 *Haw.* 134.

III. In what cases they may be justified.

A person may justify an assault, in defence of his person, or of his wife, or master, or parent, or child within age; and even a *wounding* may be justified in defence of his person, but not of his possessions. 3 *Salk.* 46.

Also if an officer having a lawful warrant lay hands on another to arrest him, or if a parent in a reasonable manner chastise his child, a master his servant, a schoolmaster his scholar, a gaoler his prisoner, and even a husband his wife as some say; or if one confine a friend who is mad, and bind and beat him in such a manner as is proper in his circumstances; or if a man force a sword from

one who offers to kill another therewith; in all these cases, and such like, it is justifiable. 1 *Haw.* 130.

Likewise a person may justify in assault and battery of another, who doth menace or assault him, and attempt to beat him from his lawful watercourse or highway. *Pult.* 42.

Likewise, if a person comes into my house, and will not go out, I may justify laying hold of him, and turning him out. *Nelf. Assault.*

And where a man in his own defence beats another who first assaults him, he may take advantage thereof, both upon an indictment, and upon an action; but with this difference, that on an indictment he may give it in evidence upon the plea of not guilty, but on an action he must plead it specially. 1 *Haw.* 134.

IV. How punished.

There is no doubt but that the wrong-doer is subject both to an action at the suit of the party, wherein he shall render damages; and also to an indictment at the suit of the king, wherein he shall be fined according to the heinousness of the offence. 1 *Haw.* 134.

And by 6 *G. c.* 23. *s.* 11. Assaulting in the street or highway, with intent to spoil people's cloaths, and so spoiling them, is felony and transportation.

And by 7 *G.* 2. *c.* 21. Assaulting with intent to rob, is also made felony and transportation.

And by 9 *An. c.* 16. Assaulting a privy counsellor in the execution of his office, is felony without benefit of clergy.

A private assault is not inquirable in the leet, not being a common nusance, as all affrays are. 1 *Haw.* 135.

Warrant for an assault.

Westmorland. { To the constable of ——— .

WHEREAS *complaint hath been made before me* J. P. *esquire, one of his majesty's justices of the peace in and for the said county, upon the oath of* A. I. *of* ——— *in the said county, taylor, that* A. O. *of* ——— *aforesaid, butcher, did on the* ——— *day of* ——— *violently assault and beat him the said* A. I. *at* ——— *aforesaid in the county aforesaid: These are therefore in his said majesty's name, to command you forthwith to apprehend the said* A. O. *and to bring him before me to answer unto the said complaint, and to be further dealt withal according to law. Given under my hand and seal the* ——— *day of* &c.

Indictment for an assault.

THE *jurors for our lord the king upon their oath present, that* A. O. *of* ——— *in the said county, butcher, on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *at* ——— *aforesaid in the county aforesaid, in and upon* A. I. *taylor, then and there being in the peace of god and of our said lord the king, with force*

force and arms, an assault did make, and him the said A. I. *then and there did beat, wound, and evil intreat, and then and there to him other enormous things did, to the great damage and hurt of him the said* A. I. *and to the evil example of all others offending in the like kind, and against the peace of our said lord the king, his crown and dignity.*

Assizes.

Assize, what.

1. ASSISE (*assessio*) anciently signified in general, a court where the judges or assessors heard and determined causes; and more particularly upon writs of *assise* brought before them, by such as were wrongfully put out of their possessions. Which writs heretofore were very frequent; but now mens possessions are more easily recovered by ejectments, and the like. Yet still the judges in their circuits have a commission of *assise*, directed to themselves and the clerk of assize, to take assizes, and to do right upon such writs.

The circuit commissions.

2. To which commission of *assise*, four other commissions are now superadded; to wit,

(1) A commission of *general gaol delivery*, directed to the judges and the clerk of assize associate; which gives them power to try every prisoner in the gaol, committed for any offence whatsoever, but none but prisoners in the gaol.

(2) A commission of *oyer and terminer*, directed to the judges and many other gentlemen of the county; by which they are impowered to hear and determine treasons, felonies, and other misdemeanors, by whomsoever committed, whether the persons to be tried be in gaol or not in gaol.

(3) A commission or writ of *nisi prius*, directed to the judges and clerk of assize, by which civil causes brought to issue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cause of action arises: and on return of the verdict of the jury to the court above, the judges there give judgment.

(4) A commission of the *peace* in every county of their circuit.

Sheriffs, justices, and others to attend there.

3. By the precept for the general gaol delivery abovementioned, the sheriff is commanded to attend there in person, with his undersheriff; and to give notice to all justices of the peace, mayors, coroners, eschcators, stewards, and also to all chief constables and bailiffs of hundreds and liberties, that they be then and there in their own persons, with their rolls, records, indictments, and other remembrances, to do those things which to their offices in that behalf appertain to be done.

By virtue whereof, all justices of the peace, mayors, and others abovementioned, of that county where the judges have their assizes, are bound to be present; and if they make default, without lawful impediment, the judges may set a fine upon them for their neglect. *Cr. Circ.* 4.

4. Also,

4. Also, by ancient custom (that is, by the common law of the land) before the coming of the judges, the high constables issue their warrants to the petty constables, to make presentments of all crimes and offences cognizable at the assizes; to the intent (as it seemeth) that the judges thereby may have a general information and knowledge, how the peace hath been kept: which presentments being delivered to the high constables, are by them delivered into court, and make up part of the rolls, and other remembrances abovementioned. Constables presentments.

Which said warrants of the high constables perhaps may be best drawn upon the words of the commission of oyer and terminer, which is the largest of all the five commissions abovementioned: And then the form thereof may be thus;

Westmorland East Ward. { To the constable of —— in the said county.

THESE *are to require you the said constable, in his majesty's name, to make out a presentment in writing of all treasons, misprisions of treasons, insurrections, rebellions; counterfeitings, clippings, washings, false coinings, and other falsities of the money of* Great Britain, *and of other kingdoms and dominions whatsoever; and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenance, oppressions, champerty, deceits, and all other evil doings, offences, and injuries whatsoever; and also the accessaries of them; by whomsoever, and in what manner soever, done, committed, or perpetrated, within your constablewick. Which said presentment so made in writing as aforesaid, and signed by you, you are to deliver to me at —— in the said county, on —— the —— day of —— at the hour of —— in the forenoon of the same day, that I may have the said presentment ready to be delivered to his said majesty's justices of oyer and terminer and general gaol delivery at the next assizes to be holden for the said county. Herein fail you not, as you will answer the contrary at your peril. Given under my hand, the —— day of —— in the year of our lord ——*

John Bowness, *High Constable.*

Attachment.

THIS word, as a law term, we have immediately from the French *attacher*, to tye, or make fast. The Italian word is *attacare*; the Spanish *attacar*; and the Saxon *tæcan*, to take.

It signifieth the taking of a man's body by commandment of a writ or precept; and is properly grantable in cases of contempts, against which for the most part all courts of record generally, but more especially those of *Westminster* hall, and above all the court of

king's bench, may proceed in a ſummary manner, according to their diſcretion. 2 *Haw.* 141.

But in the caſe of *K.* and *Bartlett, H.* 8 *G.* 2. it is ſaid, that generally the ſeſſions have not a power to award an attachment; but the court ſaid, they would not determine how it would have been, if they had committed the perſon for contempt; but the ordinary and proper method is, by indictment. *Seſſ. Ca. V.* 2. 176.

Attainder.

THE difference between a man attainted and convicted is, that a man is ſaid to be convicted before he hath judgment, as if a man be convicted by verdict or confeſſion; and when he hath his judgment upon the verdict or confeſſion, then he is ſaid to be attainted. 1 *Inſt.* 390.

That is to ſay, his blood is become *(attinctus) tainted*, ſtained, or corrupted: inſomuch that by the common law, in caſes of treaſon or felony, his children or other kindred cannot inherit his eſtate, nor his wife claim her dower; and the ſame cannot be reſtored or ſaved, but by act of parliament: and therefore in divers inſtances, there is a ſpecial proviſion by act of parliament, that ſuch or ſuch an attainder ſhall not work corruption of blood, loſs of dower, nor diſheriſon of heirs.

Attaint.

ATTAINT is a writ that lieth, where a falſe verdict in a court of record, upon an iſſue joined by the parties, is given. 1 *Inſt.* 294. Which is treated of under title Jurors.

Attorney.

Derivation.

1. ATTORNEY is an ancient *Engliſh* word, and ſignifieth one that is ſet in the *turn*, ſtead, or place of another. 1 *Inſt.* 51.

Acting before inrolled.

2. By the 2 *G.* 2. *c.* 23. (which by the 22 *G.* 2. *c.* 46. hath continuance to *June* 24. 1757, *&c.*) If any perſon ſhall act as attorney or ſolicitor, for gain or reward, without being duly admitted and inrolled; he ſhall forfeit 50 *l.* with treble coſts, to him who ſhall ſue in 12 months in any court of record at *Weſtminſter*, or at the aſſizes, or ſeſſions where the offence ſhall be committed:

and no proceedings thereupon ſhall be removed before judgment, or ſtayed by any *certiorari* or other writ. *ſ.* 24, 25.

3. No attorney or ſolicitor ſhall be capable to continue or be a juſtice of the peace, during ſuch time as he ſhall continue in the buſineſs and practice of an attorney or ſolicitor. 5 *G.* 2. *c.* 18. *ſ.* 2.

Acting as juſtice of the peace.

And if any perſon, not qualified according to the directions of this act, ſhall act as a juſtice of the peace; he ſhall forfeit 100 *l.* half to the king, and half to him that ſhall ſue in any court of record. *ſ.* 3.

4. No recuſant convict ſhall practiſe as an attorney or ſolicitor; on pain of 100 *l.* in like manner. 3 *J.* *c.* 5. *ſ.* 8.

Acting being a recuſant.

5. If any perſon who hath been convicted of forgery, perjury, or ſubornation, or common barratry, ſhall practiſe as an attorney or ſolicitor; he ſhall be tranſported for ſeven years. 12 *G.* *c.* 29. *ſ.* 4.

Convicted of forgery, &c.

6. If any perſon, not legally admitted as an attorney or ſolicitor, ſhall act as ſuch in any county court; he ſhall forfeit 20 *l.* with coſts, to him who ſhall ſue in 12 months in any court of record. 12 *G.* 2. *c.* 13. *ſ.* 7.

Who may act as attorney in the county court.

7. No perſon ſhall act as attorney or ſolicitor, at any general or quarter ſeſſions of the peace, unleſs he hath been admitted and inrolled in one of the courts of record at *Weſtminſter*; on pain of 50 *l.* with treble coſts to him who ſhall ſue in 12 months in any of the ſaid courts at *Weſtminſter*; and if any attorney ſhall permit any perſon to make uſe of his name in ſuch ſeſſions, he ſhall forfeit 50 *l.* in like manner. 22 *G.* 2. *c.* 46. *ſ.* 12.

Who may act as attorney in the ſeſſions.

And no clerk of the peace, under-ſheriff, or their deputies, ſhall act as ſolicitor, attorney, or agent at any general or quarter ſeſſions; on like pain of 50 *l.* *ſ.* 14.

8. If a ſworn attorney be choſen conſtable, he may have a writ of privilege for his diſcharge, becauſe of his perſonal attendance which is required in the courts wherein he is an attorney. 2 *Hawv.* 63.

How far exempted from offices.

And, more generally, it is ſaid, that attorneys ſhall not be elected to any office without their own conſent, by reaſon of their ſaid attendance in the courts. *Cro. Car.* 11, 585.

Yet it hath been ſaid, that an attorney ſhall not be excuſed by privilege from offices, which may be executed by deputy; but only thoſe which require perſonal duty. *March* 39.

Award.

IT is judged not foreign to the office of a keeper of the peace, to have ſome knowledge of the law contained under this title: Concerning which we will ſhew,

I. What things may be ſubmitted to arbitration.
II. The ſeveral kinds of ſubmiſſion to arbitration.
III. The award; and therein what ſhall be deemed a good award, and what not.

I. What things may be ſubmitted to arbitration.

Actions perſonal.

1. It is held clearly, that all matters of controverſy, either of fact, or of a right in things and actions perſonal and uncertain, may be ſubmitted to arbitration. 9 *Co.* 78.

Matters of freehold.

2. All matters of freehold, or any right and title to a freehold, cannot be ſubmitted to arbitrament; for a freehold is not transferable from one to another, without livery and ſeiſin: Yet if there be a ſubmiſſion concerning the right, title, or poſſeſſion of lands and tenements, and the parties enter into mutual bonds, to ſtand to the award made relating to them, they forfeit their bonds unleſs they obey it. 1 *Roll's Abr.* 242, 244. *Read. Arb. Wood* 920.

A thing certain.

3. A thing certain, as a debt due by bond or record, an annuity, and the like, cannot be ſubmitted otherwiſe than by writing; and it is moſt adviſable that the parties enter into bonds. 1 *Roll's Abr.* 264. *Cro. El.* 422.

Criminal offences.

4. Criminal matters, as treaſons, murders, felonies, and other offences indictable at the ſuit of the king, cannot be ſubmitted to arbitrament; for it is for the good of the common wealth, that ſuch offenders be made known and puniſhed: and the king in ſuch caſes is a party, for whom the other parties cannot undertake. *Weſt. Symb. Part* 2. *ſ.* 33.

But if the party injured proceeds by way of action, as he may in aſſaults and batteries, libels, and the like; the damages he ſuſtained, or expects to recover, may be ſubmitted to arbitration: for in ſuch caſe the action is for himſelf, and not for the king. *Compleat Arbitrator* 28.

Matrimonial cauſes.

5. Alſo matrimonial cauſes, or any thing concerning the contract or diſſolution of marriage, cannot be ſubmitted to arbitrament. 1 *Roll's Abr.* 252.

But the damages a perſon ſuſtained by a promiſe of marriage, or any thing relating to a marriage portion, may be ſubmitted. 16 *Ed.* 4. 2.

II. The ſeveral kinds of ſubmiſſion to arbitration.

By parol.

1. A ſubmiſſion by *words* is good, and the party in whoſe favour the award is made, hath a remedy to inforce a performance

 of

of it: Yet it is not expedient that any ſubmiſſion ſhould be by parol, becauſe the party may revoke it at pleaſure, at any time before the award made, and that by word likewiſe; and the judges will rarely inforce the performance of an award, when either the ſubmiſſion or the award is by parol, becauſe it lays ſo great a foundation for perjury. *Compl. Arb.* 21.

2. Submiſſion may alſo be by *covenant*; but this method is ſeldom uſed: for tho' it contains the ſame certainty with a bond, yet the method of ſuing on a covenant is different, and more difficult than in ſuing on a bond. *Compl. Arb.* 7. 46. By covenant.

3. Submiſſion by *rule of court* (A) is made in purſuance of the ſtatute 9 & 10 *W. c.* 15. which enacteth as follows: By rule of court.

It ſhall be lawful for all merchants and traders, and others deſiring to end any controverſy, ſuit, or quarrel (for which there is no other remedy but by perſonal action, or ſuit in equity) by arbitration, to agree that their ſubmiſſion to the award or umpirage be made a rule of any of his majeſty's courts of record, which the parties ſhall chooſe, and to inſert ſuch agreement in their ſubmiſſion, or the condition of the bond, or promiſe, whereby they ſubmit themſelves: Which agreement being ſo made, and inſerted in their ſubmiſſion or promiſe, or condition of their reſpective bonds, ſhall or may, on producing an affidavit thereof, made by the witneſſes thereunto, or any one of them, in the court of which the ſame is agreed to be made a rule, and reading and filing the ſaid affidavit in court, be entred of record in ſuch court; and a rule ſhall thereupon be made in the ſaid court, that the parties ſhall ſubmit to, and finally be concluded by ſuch arbitration or umpirage; and in caſe of diſobedience to ſuch arbitration or umpirage, the party neglecting or refuſing to perform the ſame, or any part thereof, ſhall be ſubject to all the penalties of contemning a rule of court; and the court on motion ſhall iſſue proceſs accordingly; which proceſs ſhall not be ſtopped or delayed in its execution, by any order of any other court of law or equity, unleſs it ſhall be made appear on oath to ſuch court, that the arbitrators or umpire miſbehaved themſelves, and that ſuch award was procured by corruption, or other undue means.

And this is allowed to be the moſt expeditious way; and the method is to get a counſel to move in any of the courts to have it made a rule, which in ſuch caſe is never denied; and then the party is liable to the ſame penalties that he would be for diſobeying any other rule of court. *Compl. Arb.* 6. 47.

4. Or laſtly, the ſubmiſſion may be by bond (B). In which caſe, each party muſt give to the other a bond; which bond, and condition, muſt contain exactly the ſame words, only changing the names of the parties. And the penalty of the bond ſhould at leaſt be the value of the thing ſubmitted; ſo that the party may rather abide by the award, than forfeit his obligation. *Compl. Arb.* 46. By bond.

And undoubtedly a ſubmiſſion by bond in ſome reſpects, exceeds a ſubmiſſion by rule of court; for an award made purſuant to bonds of ſubmiſſion, may bind the parties executors; but if the party, who refuſes to perform an award made purſuant to a rule

of court, ſhall die, the act of parliament directing that the proſecution ſhall be carried on by attachment, the remedy being loſt, the award is loſt likewiſe. *Compl. Arb.* 34.

Both by bond and rule of court.

5. Sometimes the ſubmiſſion is both by bond and rule of court, by adding the party's conſent at the bottom of the condition of the bond; and this is ſtill the beſt way, for then the party may proceed which way he pleaſes: and it is ſaid, that he may proceed both ways; that is to ſay, both on the bond, and have an attachment likewiſe for the contempt. 1 *Salk.* 73.

Whether the ſubmiſſion may be countermanded.

6. But in which way ſoever the ſubmiſſion is made, the ſame nevertheleſs may be revoked, tho' made irrevocable by the ſtrongeſt words; for a man cannot by his own act, make ſuch authority or power not countermandable, which by the law and in its own nature is countermandable. 8 *Co.* 82.

But if the ſubmiſſion be by bond, if the party revokes, he forfeits his obligation, for that he hath broken the words of the condition, which are, that he ſhall ſtand to and abide the award. And if he revokes, he muſt likewiſe give notice of the revocation; and if the ſubmiſſion was by bond, the revocation muſt be in writing. 8 *Co.* 82.

And if the ſubmiſſion be made a rule of court, purſuant to the act of parliament; if either of the parties revokes, the court will grant an attachment. *Compl. Arb.* 82.

But if the ſubmiſſion be by word, the party may revoke at pleaſure, and he forfeits nothing; but he muſt in this caſe likewiſe give notice of the revocation, tho' it need not be in writing: and the notice muſt be to the arbitrators themſelves. 8 *Co.* 82.

III. The award (C); *and therein what ſhall be deemed a good award, and what not.*

Arbitrators cannot adminiſter an oath.

1. The arbitrators cannot injoin an oath to the witneſſes, there being no law which gives them any ſuch power.

Award beſt to be in writing.

2. It is highly convenient that the award be in writing, and ſo to be mentioned in the ſubmiſſion. *Compl. Arb.* 34.

Whether it ſhall be upon ſtamp.

3. It is not required by any of the ſtamp acts, that an award by name ſhall be on ſtamped paper or parchment; nor doth it ſeem to be comprehended under any deſcription in the ſaid acts, unleſs it be under theſe general words [*obligatory inſtrument*]; and if ſo, then it ſhall be on a double ſixpenny ſtamp.

Award to be according to the ſubmiſſion.

4. One thing eſſential to a good award, is, that it be made, with reſpect to perſons and things, according to the ſubmiſſion. *Wood* 921.

Upon which ground, as the arbitrators are, with reſpect to the things ſubmitted, circumſcribed and tied down to the ſubmiſſion; ſo in ſeveral caſes it has been diſputed, whether their awarding releaſes to the time of the award, and not to the time of the ſubmiſſion, was good; it is therefore moſt adviſable to award releaſes to the time of the ſubmiſſion; tho' it is now clearly held, that general releaſes ſhall extend only to the time of the ſubmiſſion, and that, if there be releaſes awarded to the time of the award, they ſhall be good, unleſs it be ſhewn on the other ſide, that ſome new

new matter hath arisen between the parties between the submission and award. 1 *Roll Abr.* 242. 6 *Mod.* 34.

If the submission be, *so as the award be ready to be delivered to the parties or to such of them as shall desire the same*, the parties so bound are themselves obliged to take notice of the award at their peril; but if the words of the submission be, *so that the award be delivered to each party by such a day*, then it must be delivered to each party accordingly. *Read. Arb. Wood* 921.

But tho' the words of the submission may be such, as will oblige the parties to take notice of the award at their peril; yet if the arbitrators award that one of the parties shall do an act, which depends upon another first to be done of the other party, he must have notice of it; at least the party who would take advantage of it, must shew that he hath done what was necessary on his part. *Compl. Arb.* 12.

Award to be beneficial to either party.

5. Also, it is required, that the award be beneficial, and appoint something advantageous to either party; for an award of one side only, is not good: so if an award be, that one of the parties shall go to *Rome*, when it appears that there is no advantage to the other party by his going, it is void. *Wood* 922.

So if a man and woman submit themselves to an award, it is no good award that they shall *intermarry*, for this is not intended any advantage. 1 *Roll Abr.* 252.

Award to be possible and lawful.

6. Also it is required in a good award, that it be possible and lawful. *Wood* 922.

Thus, if an award be, that one of the parties shall kill, steal, forge a deed, or the like, it is void. 1 *Inst.* 206.

In like manner, if it be awarded, that money shall be paid to an infant, and that he shall make a release, it is void; for the infant's release is not good in law.

Also it is held, that where a thing is awarded to be done, which afterwards becomes impossible by the act of god, the party is excused; as if an award be, to deliver a horse before such a day, and he dies before that day 21 *Ed.* 4. 70.

Award to be certain and final.

7. Also, it is required, that the award be certain and final. *Wood* 922.

Upon which ground it hath been resolved, that if the arbitrators award, that one of the parties beg the other's pardon before such a mayor, or such and such persons, it is good and certain enough; but if the award be, that he shall beg pardon in such manner and in such place as the other party shall appoint, it is not good: for the arbitrators are to determine, and not to make such party his own judge in his own cause. And tho' the time and place be but circumstances, yet in this sort of satisfaction they make the most considerable part. 1 *Salk.* 71.

Upon which ground also, the arbitrators cannot regularly reserve any thing for their future judgment, when the time allowed them is expired; for then such their award is not certain and final. *Cro. Jac.* 585.

H. 13 *G. Dudley* and *Nettleford.* Upon a reference it was awarded, that the plaintiff should pay the costs; and there being

no body appointed to tax them, the court ſupplied it by ordering the maſter to do it. *Strange* 737.

Award to be conſtrued favourably, except in caſe of partiality or corruption.

8. But if theſe things are obſerved, the award ſhall be expounded according to the intent of the arbitrators, and not literally, and ſhall not be unravelled in a court of equity, unleſs there was corruption in the arbitrators. 10 *Co.* 57. *Wood* 922. *Read. Arb.*

But in the caſe of corruption, or other unfair practice, it is enacted by the aforeſaid ſtatute of 9 & 10 *W. c.* 15. that any arbitration or umpirage procured by corruption or undue means, ſhall be deemed void, and accordingly be ſet aſide by any court of law or equity, ſo as complaint thereof be made in the court where the rule is made, before the laſt day of the next term after publiſhing the arbitration. *ſ.* 2.

But generally, as the arbitrators are perſons of the parties own chuſing, and as the law preſumes that every man will be ſo wiſe as to pitch upon a perſon whoſe underſtanding and honeſty he can rely on; it hath ſeldom happened, that an award was held void when there appeared nothing elſe to vitiate it, eſpecially in a court of law: yet awards have been, and are often ſet aſide in a court of equity, for corruption and want of underſtanding in the arbitrators. *Compl. Arb.* 73.

Therefore it is the intereſt of both parties, to chuſe men of honeſty and underſtanding to be their arbitrators, and to acquaint them truly with the facts they are to go upon; for if they appear to be miſtaken in a matter of fact, a court of equity will ſet aſide the award. 2 *Vern.* 705.

But a bare ſuggeſtion of want of underſtanding, or want of honeſty, will not be ſufficient; the proof muſt be ſtrong, and the rather, becauſe (as was ſaid) they are of the party's own chuſing, who by his choice of them, admitted them to be wiſe and honeſt enough for his purpoſe. *Compl. Arb.* 74.

If a ſubmiſſion is to three arbitrators, or any two of them, and two of them by fraud or force will exclude the other; that alone is ſufficient to vitiate the award; or if they have private meetings, and admit one of the parties, but give no notice to the other, but ſuffer the attorney of the party whom they admitted, to draw up the award; ſuch award ſhall be ſet aſide for partiality and unfairneſs. 2 *Vern.* 514.

It is a general rule in equity, that when it appears that any one of the arbitrators were any way *intereſted* in the matters in controverſy, the award is to be ſet aſide. *Compl. Arb.* 75.

And it is the ſtrongeſt argument of partiality, to ſhew that the arbitrators received from either of the parties any conſiderable ſum of money, or any other preſent which may be a temptation to act corruptly; but the ſum or preſent muſt be proved to be ſo exorbitant, as to induce the court to believe that it biaſſed their judgments; otherwiſe it will be of no effect. *Compl. Arb.* 76.

Where the award appoints no time, the thing is to be done immediately.

9. If the arbitrators award a thing to be done, it may be proper for them to appoint a time and place for the doing of it; and the party who would take advantage of it, muſt ſhew that he has done

done what was requisite on his part: but if a thing is to be done generally, without mentioning time and place, it shall be done immediately. 2 *Brown.* 311.

10. If the submission is by rule of court, it is necessary that there be a personal demand of the thing awarded; and the party must make affidavit of such demand, before he can have an attachment. 1 *Salk.* 83.

Demand to be before attachment.

11. If a sum of money be awarded to one of the parties, and that upon the payment thereof they both shall give mutual releases; if he who is to receive the money, refuses it, yet upon a tender and refusal, he is as much obliged to sign a release as if he actually received it. 1 *Salk.* 75.

On tender and refusal, the party refusing shall nevertheless sign a release.

A. Form of a submission by rule of court.

WHEREAS *divers disputes and controversies have arisen, and are now depending, between* A. B. *of* ——— *in the county of* ——— *yeoman, of the one part, and* C. D. *of* ——— *in the said county, yeoman, of the other part, touching and concerning* ——— *Now for the ending and deciding thereof, it is hereby mutually agreed by and between the said parties, that all matters in difference between them for, touching, and concerning all and every the matters and things herein above specified and particularly mentioned, shall be referred and submitted to the arbitrament, final end, and determination of* A. A. *of* ——— *in the said county, gentleman,* B. A. *of* ——— *in the said county, yeoman, and* C. A. *of* ——— *in the said county, yeoman, or any two of them, arbitrators indifferently elected by the said parties, so as the said arbitrators, or any two of them, do make and publish their award in writing ready to be delivered to the said parties, or such of them as shall desire the same, on or before the* ——— *day of* ——— *next ensuing the date hereof: And it is hereby mutually agreed by and between the said parties, that this submission shall be made a rule of his majesty's court of king's bench at* Westminster. *In witness whereof the said parties to these presents have hereunto set their hands this* ——— *day of* ——— *in the* ——— *year* &c.

B. Arbitration bond.

KNOW *all men by these presents, that I* A. B. *of* ——— *in the county of* ——— *gentleman, am held and firmly bound to* C. D. *of* ——— *in the said county of* ——— *yeoman, in* ——— *pounds of good and lawful money of* Great Britain, *to be paid to the said* C. D. *or to his certain attorney, his executors, administrators, or assigns: To which payment well and truly to be made, I bind my self, my heirs, executors, and administrators firmly by these presents, sealed with my seal, and dated the* ——— *day of* ——— *in the* ——— *year of the reign of our sovereign lord* George *the second, of* Great Britain, France *and* Ireland, *king,*

king, defender of the faith, and so forth, and in the year of our lord ———.

Condition to stand to the award of two arbitrators, in common form:

THE *condition of the above obligation is such, that if the above bound* A. B. *his heirs, executors, and administrators, and every of them, for and on his and their parts and behalfs, do and shall well and truly stand to, obey, abide, perform, observe and keep the award, order, arbitrament, final end and determination of* A. A. *of* ——— *esquire, and* B. A. *of* ——— *gentleman, arbitrators indifferently named, elected, and chosen, as well for and on the part and behalf of the abovebound* A. B. *as of the abovenamed* C. D. *to arbitrate, award, order, adjudge and determine of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, judgments, executions, extents, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages and demands whatsoever, both in law and equity, or otherwise howsoever, which at any time or times heretofore have been had, made, moved, brought, commenced, sued, prosecuted, committed, omitted, done or suffered by or between the said parties, so as the said award be made in writing, and ready to be delivered to the said parties, on or before the* ——— *day of* ——— *now next ensuing, then this obligation to be void, otherwise of force.*

If the parties have a mind to make their submission a rule of court, then this may be added:

And the abovebound A. B. *doth agree and desire, that this his submission be made a rule of his majesty's court of king's bench at* Westminster, *pursuant to the act of parliament in such case made and provided.*

Condition to stand to the award of three arbitrators, or any two of them, and an umpire appointed:

THE *condition of this obligation is such, that if the abovebound* A. B. *his heirs, executors, and administrators, for and on his and their parts and behalfs, shall and do well and truly stand to, obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament, final end and determination of* ——— *or any two of them, arbitrators indifferently elected and made, as well by and on the part and behalf of the said* A. B. *as by and on the part and behalf of the abovenamed* C. D. *to arbitrate, award, order judge and determine, of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings,*

ings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties; so as the award of the said arbitrators, or any two of them, be made and set down in writing, under their or any two of their hands and seals, ready to be delivered to the said parties in difference, on or before the ——— day of ——— now next ensuing; then this obligation to be void, otherwise of force.

And if the said arbitrators shall not make such their award of and concerning the premisses, within the time limited as aforesaid, then if the said A. B. *his heirs, executors, and administrators, for and on his and their part and behalf, do and shall well and truly stand to, observe, perform, fulfil and keep the award, determination, and umpirage* [if the umpire be named] *of ——— being a person indifferently named and chosen between the said parties, for umpire;* [if not named] *of such person as the said arbitrators shall indifferently chuse for umpire in and concerning the premisses; so as the said umpire do make and set down his award and umpirage in writing, under his hand and seal, ready to be delivered to the said parties in difference, on or before the ——— day of ——— now next ensuing: Then this obligation to be void, otherwise of force.*

[*And the abovebound* A. B. *doth agree and desire, that this his submission be made a rule of his majesty's court of king's bench at* Westminster, *pursuant to the act of parliament in such case made.*]

C. Form of an award.

TO *all to whom these presents shall come, we* A. B. *of ——— and* C. D. *of ——— do send greeting.*

Whereas there are several accounts depending, and divers controversies have arisen, between ——— of ——— yeoman, of the one part, and ——— of ——— yeoman, of the other part; And whereas, for the putting an end to the said differences, they the said ——— and ——— by their several bonds or obligations bearing date ——— last past, are reciprocally become bound each to the other, in the penal sum of ——— to stand to, abide, perform, and keep the award, order, and final determination of us the said ——— so as the said award be made in writing and ready to be delivered to the parties in difference on or before ——— next ensuing, as by the said obligations and conditions thereof may appear: Now know ye, that we the said arbitrators, whose names are hereunto subscribed, and seals affixed, taking upon us the burden of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do make and publish this our award between the said parties in manner following; that is to say, First, we do award and order, that all actions, suits, quarrels, and controversies whatsoever, had, moved, arisen, and depending between the said parties in law or equity, for any manner of cause whatsoever touching the said premisses, to the day of the date here-

of,

of, shall cease and be no farther prosecuted; and that each of the said parties shall pay and bear his own costs and charges in any wise relating to, or concerning the premisses. And we do also award and order, that the said ——— shall deliver or cause to be delivered to the said ——— at ——— within the space of ——— &c. And further, we do hereby award and order, that the said ——— shall on or before ——— pay or cause to be paid unto the said ——— the sum of ——— We do also award and order &c. And lastly, We do award and order, that the said ——— and ——— on payment of the said sum of ——— shall in due form of law, execute each to the other of them, or to the other's use, general releases, sufficient in the law for the releasing by each to the other of them, his heirs, executors, and administrators, of all actions, suits, arrests, quarrels, controversies, and demands whatsoever, touching or concerning the premisses aforesaid, or any matter or thing thereunto relating, from the beginning of the world, until the ——— day of ——— last past (viz. the day of the date of the arbitration bonds). *In witness whereof we have hereunto set our hands and seals the ——— day of ———.*

Form of an umpirage.

(RECITE the arbitration bonds, as before) *Now know ye, that I ——— umpire indifferently chosen by ——— having deliberately heard and understood the griefs and allegations and proofs of both the said parties, and willing (as much as in me lieth) to set the said parties at unity and good accord, do by these presents arbitrate, award, order, decree, and judge as followeth; That is to say,* &c.

Badger of Corn. See Corn.

Bail.

I. What it is.
II. Difference between bail and mainprise.
III. When a person may be discharged without bail.
IV. Who may or may not be bailed.
V. Who may bail, and the manner of it.
VI. Requiring excessive bail.
VII. Denying bail where it ought to be granted.
VIII. Granting bail where it ought to be denied.
IX. Of bail by writ of habeas corpus.
X. Acknowledging bail in another man's name.

I. What it is.

BAIL (from the *French bailler*, to deliver) signifies the delivery of a man out of custody, upon the undertaking of one or more persons for him, that he shall appear at a day limited, to answer and be justified by the law. *Hale's Pl.* 96.

II. Difference between bail and mainprise.

The difference between bail and mainprise is, that mainpernors are only surety, but bail is a custody; and therefore the bail may retake the prisoner, if they doubt he will fly, and detain him, and bring him before a justice, and the justice ought to commit the prisoner in discharge of the bail, or put him to find new sureties. *Hale's Pl.* 96.

III. Where a person may be discharged without bail.

If a person be brought before a justice, if it appears that no felony is committed, he may discharge him; but if a felony be committed, tho' it appears not that the party accused is guilty, yet he cannot discharge him, but must commit or bail him. *Hale's Pl.* 98.

IV. Who may or may not be bailed.

At the common law, bail was allowed in all cases but homicide; but now the statute of the 3 *Ed.* 1. *c.* 15. directeth what offenders shall be bailed, and what not. *Hale's Pl.* 97.

It

It is true, the said statute only prescribeth, who shall or shall not be let to bail by the *sheriff*; but by the 1 & 2 *P. & M. c.* 13. it is enacted, that no justice of justices of the peace shall let to bail or mainprise any person not replevisable by the said statute of 3 *Ed.* 1. *c.* 15.

Which statute is as follows: *Forasmuch as sheriffs and others, which have taken and kept in prison persons detected of felony, and incontinent have let out by replevin such as were not replevisable, and have kept in prison such as were replevisable, because they would gain of the one party and grieve the other; and forasmuch as before this time it was not determined which persons were replevisable, and which not, but only those that were taken for the death of man, or by commandment of the king, or of his justices, or for the forest: It is provided, that such prisoners as before were outlawed, and they which have abjured the realm, provors, and such as be taken with the manner, and those which have broken the king's prison, thieves openly defamed and known, and such as be appealed by provors so long as the provors be living, (if they be not of good name,) and such as be taken for houseburning feloniously done, or for false money, or for counterfeiting the king's seal, or persons excommunicate taken at the request of the bishop, or for manifest offences, or for treason touching the king himself, shall be in no wise replevisable by the common writ, nor without writ. But such as be indicted of larceny by inquests taken before sheriffs or bailiffs by their office, or of light suspicion, or for petit larceny, that amounteth not above the value of* 12d. *if they were not guilty of some other larceny aforetime, or guilty of receipt of felons, or of commandment, or force, or of aid in felony done, or guilty of some other trespass for which one ought not to lose life nor member, and a man appealed by a provor after the death of the provor (if he be no common thief nor defamed), shall from henceforth be let out by sufficient surety, whereof the sheriff will be answerable, and that without giving ought of their goods.*

Sheriffs and others) That is to say, sheriffs and gaolers that have custody of gaols; so that this act extends not to any of the king's justices or judges of any superior courts of justice. 2 *Inst.* 185. But by a subsequent statute (as hath been said) it is extended to justices of the peace.

But only those, &c.) Here are first set down four sorts of persons which before this act were not bailable by the common writ *de homine replegiando:*

1. *Those that were taken for the death of a man*] By the ancient law of the land, in all cases of felony, if the party accused could find sufficient sureties, he was not to be committed to prison; but afterwards it was provided by parliament, that in case of homicide the offender was not bailable. 2 *Inst.* 186.

And even if a person hath dangerously *wounded* another, the justice ought to be very cautious how he takes bail, till the year and day be past; for if the party die, and the offender appear not, he is in danger of being severely fined. 1 *Haw.* 138.

And this statute makes no distinction between such homicide as is malicious, and that which happens by misadventure or in self defence:

defence: And it ſeems agreed, that juſtices of the peace, who have power at this day to bail a man arreſted for a *light ſuſpicion* of homicide, cannot bail any ſuch perſon for manſlaughter, or even excuſable homicide, if it manifeſtly appear that he was guilty of the fact, let it be ever ſo plain that it cannot amount to murder. 2 *Haw* 95, 105.

2. *Or by commandment of the king*] That is, by matter of record in one of his courts, according to law; and not an extrajudicial commandment. 2 *Inſt.* 186, 187. So alſo it is provided in the petition of rights 3 *Car.* that no perſon ſhall be detained in priſon by the king's ſpecial command, without cauſe certified.

And becauſe ſome courts, as the king's bench, are before the king, and ſome before his juſtices, therefore the act ſaith, *by commandment of the king*, and the next words be, *or of his juſtices*. 2 Inſt. 186.

3. *Or of his juſtices*] That is, of any of the courts of *Weſtminſter*, or juſtices of aſſize. 2 *Haw.* 96.

4. *Or for the foreſt*] But as to impriſonment for offences in foreſts, the law hath been much mitigated by later ſtatutes. 2 *Haw.* 98.

All theſe four are excepted out of the common writ *de homine replegiando*, that the ſheriff in his county court, which is not a court of record, ſhall not replevy any of theſe four that are committed, altho' it ſhould be by an unlawful commitment; but the ſuperior courts at *Weſtminſter*, upon an *habeas corpus*, ſhall do juſtice to the party in all theſe four caſes. 2 *Inſt.* 187.

Next, the act doth further provide, that theſe kinds of priſoners hereafter following (being 13 in number) ſhall not be repleviſable:

1. *Such priſoners as before were outlawed*] Perſons outlawed are *attainted* in law, and therefore are not bailable; for the intendment of the law is, that the perſon ſtandeth indifferent whether he be guilty or no; and not if he be convicted or attainted. 2 *Inſt.* 188.

2. *And they which have abjured the realm*] For theſe alſo are attainted upon their own confeſſion, and therefore not bailable at all by law. 2 *Inſt.* 188.

3. *Provors*] A provor, or *approver*, is a perſon that confeſſeth the felony with which he is charged, and undertakes to *prove* another guilty of the ſame crime; which if he does, he ſaves his own life, otherwiſe he ſhall be immediately executed. And the reaſon why they are not bailable is, becauſe they are guilty by their own confeſſion, and therefore they do not ſtand indifferent. 2 *Inſt.* 188.

But this concerns not juſtices of the peace, becauſe no man can become an approver before them, for that they cannot aſſign a coroner. *Hale's Pl.* 102.

4. *And ſuch as be taken with the manner*] For in this caſe likewiſe, he ſtandeth not indifferent whether he be guilty or no, being taken with the *mainer*, that is, with the thing ſtolen as it were in his *hand*, anciently called *handhabbend*, and the like was anciently called

called *backberend*, as a bundle or fardle at his *back*; which was used to signify manifest theft. 2 *Inst.* 188.

5. *And those which have broken the king's prison*] Here are two offences; first, his breaking of the prison, for it is presumed that he who is innocent will never break prison: and secondly, his flying, because he confesseth the fact who flies from judgment. 2 *Inst.* 188.

6. *Thieves openly defamed and known*] Who, as it seems. ought not to be bailed for any fresh felony, whereof there is probable evidence against them. But this seems in a great measure to be left to the discretion of the person who has power to bail them, who on consideration of the circumstances of the whole matter, and the probabilities on both sides, if he finds it reasonable strongly to presume them to be guilty, ought not to bail but commit them. 2 *Haw.* 99.

7. *Such as be appealed by provors, so long as the provors be living, if they be not of good fame*] The appeal of the approver is forcible against the appellee, because the approver confesseth himself guilty of the same felony, and therefore it serveth in nature of an indictment against the appellee, so long as the approver liveth, unless the appellee be of good fame. 2 *Inst.* 188.

8. *And such as be taken for houseburning feloniously done*] This was felony by the common law. 2 *Inst.* 188.

9. *Or for false money*] This was treason by the common law. 2 *Inst.* 188.

10. *Or for counterfeiting the king's seal*] This was also treason by the common law. 2 *Inst.* 188.

11. *Or persons excommunicate, taken at the request of the bishop*] That is, he that is certified into the chancery by the bishop to be excommunicated, and after is taken by force of the king's writ of *excommunicato capiendo*, is not bailable: For in ancient time men were excommunicated but for heresies, or other heinous causes of ecclesiastical cognizance, and not for small or petty causes; and therefore in those cases the party was not bailable by the sheriff or gaoler without the king's writ; but if the party offered sufficient caution *de parendo mandatis ecclesiae in forma juris*, then should the party have the king's writ to the bishop to accept his caution, and to cause him to be delivered: And if the bishop will not send to the sheriff to deliver him, then shall he have a writ out of the chancery to the sheriff for his delivery: Or if he be excommunicated for a temporal cause, or for a matter whereof the ecclesiastical court hath no cognizance, he shall be delivered by the king's writ without any satisfaction. 2 *Inst.* 189.

12. *For manifest offences*] Which seems to be understood of inferior crimes of an enormous nature under the degree of felony; as dangerous riots, exorbitant rescouses, misprision of treason, *præmunire*, and such like heinous offences. Yet it seems to be in a great measure left to discretion, to judge in what cases their crime

crime is so flagrant and enormous, that they ought not to have the benefit of it. 2 *Haw.* 99.

13. *Or for treason touching the king himself*] By the common law, a man accused or indicted of high treason, or of any felony whatsoever, was bailable upon good surety, until he were convicted; for at common law, the gaol was his pledge or surety, that could find none. 2 *Inst.* 189.

Shall be in no wise replevisable by the common writ, nor without writ] That is, the sheriff shall not replevy them by the common writ *de homine replegiando*, nor without writ, that is, *ex officio:* But all or any of these may be bailed in the king's bench. 2 *Inst.* 189.

Next the act setteth down seven kinds of offenders that may be bailed:

1. *Such as be indicted of larceny by inquests taken before sheriffs or bailiffs*] That is, before sheriffs in their torns, or lords in their leets, or those that have *infangthief* and *outfangthief*. Yet this is expounded that they be of good fame. 2 *Inst.* 190.

2. *Or of light suspicion*] But if the presumption be strong, or the defamation great, the justices may refuse to bail him. *Hale's Pl.* 102. And this is expounded also that they be of good fame. 2 *Inst.* 190.

3. *Or for petit larceny that amounteth not above the value of* 12 d. *if they were not guilty of some other larceny aforetime*] This act divideth larceny into two kinds; grand larceny, when the thing stolen is above the value of 12 *d.* and petit larceny, when it is of the value of 12 *d.* or under. 2 *Inst.* 189.

And it seems to be agreed, that there is no necessity that such persons be of good fame; yet upon the construction of the whole statute, if such persons be taken with the manner, or confess the fact, or their crime be otherwise open and manifest, it seems that they ought not to be bailed; but if there be any colour of probability for their innocence, it seems most agreeable to the intention of the statute to bail them. 2 *Haw.* 101.

4. *Or guilty of receipt of felons*] These are accessaries after the fact. 2 *H. H.* 100.

5. *Or of commandment, or force, or of aid in felony done*] These are accessaries before the fact. 2 *H. H.* 100.

But accessaries to felonies are not to be bailed, unless they be of good reputation: And it seems at this day to be settled, that where there are strong presumptions of guilt, such accessaries are not bailable by this statute. 2 *Haw.* 102.

6. *Or guilty of some other trespass, for which one ought not to lose life nor member*] But it seems reasonable to qualify the generality of this expression, with this limitation, that such accusation ought to be either on a light suspicion, or else that the offence be inconsiderable, or that it be not excluded from bail by some special act of parliament. 2 *Haw.* 99. 2 *H. H.* 135.

7. *And a man appealed by a provor, after the death of the provor, if he be no common thief, nor defamed*] And by parity of reason, he may be bailed, if the approver waive his appeal, or be vanquished. 2 *Haw.* 98.

Be let out by sufficient surety] If a justice take insufficient surety, and the party appear not, he is finable by the judge of assize. *H. P.* 97. But if the prisoner appear thereupon, the justice is safe. 2 *Haw.* 89.

And if a person who has power to take bail, be so far imposed upon, as to suffer a prisoner to be bailed by insufficient persons, it is said, that either he, or any other person who hath power to bail him, may require the party to find better sureties, and to enter into a new recognizance with them, and may commit him on his refusal, for that insufficient sureties are no sureties. 2 *Haw.* 89.

And the person who is to take the bail, may examine them on their oaths concerning their sufficiency. 2 *Haw.* 89. 2 *H. H.* 125.

It is to be observed, that the abovesaid statute extends only to bail in criminal offences, and therefore gives no power at all to justices of the peace to bail any persons on process in civil actions, or for contempts to superior courts. 2 *Haw.* 106.

There are furthermore many statutes, which prohibit bail and mainprise in very many cases, and allow the same in many others, which are intersperfed among the several titles which treat of those matters.

And where a statute ordaineth, that an offender shall be imprisoned at the king's will or pleasure, there the prisoner cannot be bailed, till he hath redeemed his liberty by such fine or ransom as shall be assessed by the king's justices in his courts. *Dalt. c.* 167.

Altho' a person be committed to be detained without bail or mainprise, yet if the offence be by law bailable, he that hath power of bailing may bail him. 2 *H. H.* 135.

V. Who may bail, and the manner of it.

By the common law, the sheriff and every constable, being conservators of the peace, might have bailed one suspected of felony; but this authority is transferred from them to the justices of the peace by the several statutes. *Lamb.* 15.

And it seems to be a good general rule, that so far as any persons are judges of any crime, so far they have power of bailing a person indicted before them of such crime: And upon this ground it seems clear, that any two justices (1 Q.) may of common right bail persons indicted at the sessions, for that any two such justices may hear and determine the indictment. Also it hath been holden, that any one justice hath the like power; and this seems to be implied by the statute of 1 *R.* 3. *c.* 3. which giving one justice power of bailing persons arrested for felony, *in like form as if such persons had been indicted at the sessions*, clearly supposes, that if such persons had been indicted at the sessions, they might have been bailed by any one justice. And if any one justice had such power,

before the ſtatutes ſpecially relating to the power of juſtices in granting bail, it ſeems that he hath ſtill the ſame power in relation to perſons ſo indicted of any bailable crime under the degree of *felony*, becauſe the ſaid ſtatutes ſeem not to reſtrain him in any ſuch caſe, under the degree of felony, from any power which he lawfully might claim before. 2 *Haw.* 103.

But it ſeems difficult to maintain the power of one juſtice to bail a perſon, for any crime *before* indictment, unleſs by ſome ſtatute it be limited to the conuſance of one juſtice, or unleſs it be an offence directly tending to the breach of the peace, the bailing of perſons for which ſeems properly to come under their conuſance as conſervators of the peace. 2 *Haw.* 105.

And Mr. *Dalton* ſays, if it is not in caſe of felony, it ſeemeth that any one juſtice alone may bail a priſoner, except where it is otherwiſe ordered in particular inſtances by ſome ſpecial ſtatute. *Dalt. c.* 12.

And it ſeems to be agreed, that any one juſtice might always in his diſcretion either bail or impriſon one who has given another a dangerous wound, according as it ſhall appear from the whole circumſtances that the party is moſt likely to live or die; for that every ſuch juſtice being a principal conſervator of the peace, the offence at preſent being only an enormous breach thereof, and no felony, ſeems properly to come under his conuſance. 2 *Haw.* 103.

But by 1 & 2 *P. & M. c.* 13. *If a perſon be arreſted for* manſlaughter, *or* felony, *or* ſuſpicion thereof, *being bailable by law, he ſhall not be let to bail or mainpriſe by any juſtices, but in open ſeſſions, except it be by two juſtices at the leaſt* (1 Q.), *and the ſame to be preſent together at the time of the ſaid bailment: Which bail they ſhall certify in writing ſubſcribed or ſigned with their own hands, at the next general gaol delivery to be holden within the county where the perſon ſhall be arreſted or ſuſpected.*

And the ſaid juſtices, or one of them, being of the Quorum, *when any ſuch priſoner is brought before them, for any manſlaughter or felony, before any bailment, ſhall take the examination of the ſaid priſoner, and information of them that bring him, of the fact and circumſtances thereof, and the ſame or as much thereof as ſhall be material to prove the felony, ſhall put in writing before they make the bailment: Which examination together with the bailment, the ſaid juſtices ſhall certify at the next general gaol delivery to be holden within the limits of their commiſſion.*

And the ſaid juſtices ſhall have power to bind all ſuch by recognizance as do declare any thing material to prove the offence, to appear at the next general gaol delivery, to give evidence againſt the party on his trial: And ſhall certify the ſame in like manner.

And any juſtice offending contrary to this act, ſhall on due proof by examination, be fined by the judges of aſſize.

But in London, Middleſex, *and in other cities and towns corporate, juſtices may let priſoners to bail, as they might before this act; but when they do bail, they are to take and certify the bail and examination as is here directed.*

VI. Requiring excessive bail.

By the declaration of rights 1 *W. sess.* 2. *c.* 2. Excessive bail ought not to be required.

VII. Denying bail where it ought to be granted.

To refuse bail where the party ought to be bailed (the party offering the same) is a misdemeanor punishable not only by the suit of the party, but also by indictment. 2 *Haw.* 90. *H. P.* 97.

VIII. Granting bail where it ought to be denied.

Admitting bail where it ought not, is punishable by the judges of assize by fine; or punishable as a negligent escape at common law. *H. P.* 97.

If the keeper of a prison bail any not bailable, he shall lose his fee and office; if another officer, he shall have three years imprisonment, and make fine at the king's pleasure. 3 *Ed.* 1. *c.* 15.

M. 18 *G.* 2. *K.* and *William Clarke*, esquire. He as a justice of *Surrey* committed a man on suspicion of stealing a mare, and bound over the owner to prosecute. Afterwards upon examining two other persons, he admitted the party to bail. The prosecutor appeared at the assizes, and found a bill, but the party accused did not appear. And the court granted an information against the justice, declaring they should not have bailed the man themselves. *Str.* 1216.

IX. Of bail by writ of habeas corpus.

If bail cannot otherwise be obtained, the law hath provided a remedy in most cases by the *habeas corpus* act 31 *C.* 2. *c.* 2. The substance of which is briefly thus:

If the commitment is for treason or felony, plainly and specially expressed in the warrant of commitment; also if any person is committed and charged as accessary before the fact to any petty treason or felony, or upon suspicion thereof, or with suspicion of petty treason or felony, which petty treason or felony shall be plainly and specially expressed in the warrant of commitment: In such cases the person shall not be bailed on a writ of habeas corpus; *otherwise he may be bailed.*

Also if a person is committed for treason or felony specially expressed, yet if he shall in open court the first week of the term, or first day of assize, petition to be tried, and shall not be indicted sometime in the next term or assize after the commitment, he shall upon motion the last day of the term or assize, be bailed, unless it shall appear to the judge upon oath that the king's witnesses could not be produced within that time, and then if he is not tried in the second term or assize, he shall be discharged.

Previous to the aforesaid bailment, the prisoner or some person on his behalf, shall demand of the officer or keeper, a true copy of the warrant

warrant of commitment, which he shall deliver in six hours, on pain of 100l. *to the party grieved, for the first offence, and* 200l. *and forfeiture of his office for the second.*

Then application is to be made in writing, by the prisoner or any person for him, attested and subscribed by two witnesses who were present at the delivery thereof, to the court of chancery, king's bench, common pleas, or exchequer, or if out of term time, to the lord chancellor or one of the judges; and a copy of the warrant of commitment shall be produced before them, or oath made that such copy was denied.

But if any person hath wilfully neglected by the space of two terms to apply for his enlargement, he shall not have a habeas corpus *granted in the vacation.*

This being done, the lord chancellor, or judges respectively, shall award an habeas corpus *under the seal of the court, on pain of* 500l. *to be marked in this manner,* Per statutum tricesimo primo Caroli secundi Regis, *and signed by the person that awards the same; and shall be directed to the officer or keeper, returnable* immediate.

And the charges of bringing the prisoner shall be ascertained by the judge or court that awarded the writ, and indorsed thereon, not exceeding 12d. *a mile.*

Then the writ shall be served on the keeper, or left at the gaol with any of the under officers; and the charges so indorsed, shall be paid or tendered to him, and the prisoner shall give bond to pay the charges of carrying him back if he shall be remanded, and that he will not make any escape by the way.

This done, the officer shall within three days after service (if it is within twenty miles) return the writ, and bring the body, and shall then likewise certify the true cause of the imprisonment; if above twenty miles, and less than an hundred, then within ten days; if above an hundred, then within twenty days; on like pain as before.

But after the assizes are proclaimed for the county where the prisoner is detained, he shall not be removed.

Then if it shall appear to the said lord chancellor or judges, that the prisoner is detained on a legal process, order, or warrant, out of some court that hath jurisdiction of criminal matters, or by warrant of a judge or justice of the peace for matters for the which by law he is not bailable; in such case the prisoner shall not be discharged.

If he shall be discharged, he shall thereupon enter into recognizance to appear on his trial; and the writ, and return thereof, and recognizance shall be certified into the court where the trial must be.

But persons charged in debt, or other action, or with process in any civil cause, after their discharge for a criminal offence, shall be kept in custody for such other suit.

And persons so set at large, shall not be re committed for the same offence, unless by order of court; on pain of 500l. *to the party grieved.*

Two things I shall observe upon this statute:

1. That altho' the constable by his own authority, without any warrant of commitment, may carry an offender to gaol, and this

was the method of ſecuring priſoners, before that there were any juſtices of the peace; yet ſince the inſtitution of that magiſtrate, it is better that they be carried before him, to be ſent by him to gaol by warrant of commitment; otherwiſe they have a right to be bailed upon this act, whatever the offence may be.

2. That the warrant of commitment ought to ſet forth the cauſe ſpecially; that is to ſay, not for treaſon or felony in general, but treaſon *for counterfeiting the king's coin*, or felony *for ſtealing the goods of ſuch a one to ſuch a value*, and the like; that ſo the court may judge thereupon, whether or no the offence is ſuch, for which a priſoner ought to be admitted to bail.

X. *Acknowledging bail in another man's name.*

By the 21 *J. c.* 26. *If any perſon ſhall acknowledge, or procure to be acknowledged, any bail in the name of any other not privy to the ſame; he ſhall be guilty of felony without benefit of clergy.*

In the name of any other] *T.* 6 *G.* Two people put in bail in feigned names, and becauſe there were no ſuch perſons, they could not be proſecuted for perſonating bail on this ſtatute. So the court ordered them and the attorney to be ſet in the pillory, which was done accordingly. *Str.* 384.

Bail taken before a judge is not within this ſtatute, till it be filed of record. 1 *H. H.* 696. But it is within the following ſtatute of 4 *W. c.* 4. by which it is enacted, that *any who ſhall perſonate another before thoſe who have authority to take bail, ſo as to make him liable to the payment of any ſum of money in that ſuit or action, ſhall be guilty of felony* (but within clergy).

Form of bail.

Weſtmorland. BE *it remembred, that on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— A. O. *of* ——— *yeoman*, A. B. *of* ——— *yeoman, and* B. B. *of* ——— *yeoman, came before us* John Moore, *eſquire, and* Richard Burn, *clerk, two of his majeſty's juſtices of the peace in and for the ſaid county, one whereof is of the* Quorum, *and ſeverally acknowledged themſelves to owe to our ſaid lord the king, that is to ſay, the ſaid* A. O. 20 l. *and the ſaid* A. B. *and* B. B. 10 l. *each, to be reſpectively levied of their lands and tenements, goods and chattels, if the ſaid* A. O. *ſhall make default in the performance of the condition indorſed,* [or, *underwritten*].

John Moore,
Richard Burn.

The condition of this recognizance is ſuch, that if the within [*above*] *bound* A. O. *ſhall perſonally appear before the juſtices of our ſovereign lord the king aſſigned to keep the peace within the ſaid county, and likewiſe to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, at the next general quarter ſeſſions of the peace* [or, *before his majeſty's juſtices of gaol*

gaol delivery, at the next general gaol delivery] *to be holden in and for the said county, then and there to answer to our said sovereign lord the king, for and concerning the felonious taking and stealing of* ——— *the property of* A. M. *of* ——— *yeoman, with the suspicion whereof the said* A. O. *stands charged before us the said justices, and to do and receive what shall by the court be then and there enjoined him, and shall not depart the court without licence, then the above* [*within*] *written recognizance shall be void.*

Or if the party is in prison, and so absent, Lord *Hale* says, this is the true form from *Lambard.*

Westmorland. BE *it remembred, that on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *before us* John Moore, *esquire, and* Richard Burn, *clerk, two of the justices of our said lord the king, assigned to keep the peace within the said county, and one of us of the* Quorum, *at* Grimeshill *in the said county, did come* A. B. *and* B. B. *of* ——— *in the said county, yeoman, and took in bail until the next gaol delivery to be holden in the said county, one* A. O. *of* ——— *labourer, taken and detained in prison for suspicion of a certain felony in stealing* ——— *the property of* ——— *and took upon themselves each of the said* A. B. *and* B. B. *under the penalty of* 20l. *of good and lawful money of* Great Britain, *of the goods and chattels, lands and tenements, of them and each of them, to the use of our said lord the king, his heirs and successors, to be levied, if the said* A. O. *shall not personally appear at the said next gaol delivery, before the justices of our said lord the king, assigned to deliver the said gaol, to stand to right concerning the felony aforesaid, according to the law and custom of* England. *Given under our seals* &c.

But the seal need not be, for they are judges of record; only it may be barely subscribed by them: or thus,

Taken and acknowledged the day and year abovewritten, before us the abovesaid

John Moore,
Ri. Burn.

And hereupon a warrant issues for his deliverance, thus:

Westmorland. JOHN Moore, *esquire, and* Richard Burn, *clerk, two of the justices of* ——— *and one of us of the* Quorum, *To the keeper of his majesty's gaol at* ——— *in the said county, greeting. Forasmuch as* A. O. ——— *labourer, hath before us found sufficient sureties to appear before the justices of gaol delivery at the next general gaol delivery to be holden in the said county, to answer to such things as shall be then on the behalf of our said sovereign lord objected against him, and namely, to the felonious taking of* ——— *(for the suspicion whereof he was taken,*

and committed to your said gaol); We command you on the behalf of our said sovereign lord, that if the said A. O. *do remain in your said gaol for the said cause, and for none other, then you forbear to detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will thereon ensue. Given under our seals at* Orton *in the said county, the* ——— *day of* ——— *in the* ——— *year* ———.

Lord *Hale* says, the advantage of this latter kind of bail is this, that it is not only a recognizance in a sum certain, but also a real bail, and they are his keepers, and may be punished by fine beyond the sum mentioned in the recognizance, if there be cause; and may reseize him if they doubt his escape, and have him committed, and so be discharged of the recognizance.

Bailiff. See Sheriff.
Baker. See Bread.

Banks destroying.

Powdike.

1. EVERY perverse and malicious cutting down and breaking up of any part of the dike called new *Powdike* in *Marshland* in the county of *Norfolk*, and the broken dike called *Old field dike* by *Marshland* in the isle of *Ely*, or of any other bank being parcel of the rind and uppermost part of the said country of *Marshland*, made for the defence and salvation of the said country of *Marshland*, shall be adjudged felony. And the sessions may determine the same. 22 *H.* 8. *c.* 11.

Sea and river banks.

2. By a clause in the statute of 6 *G.* 2. *c.* 37. *s.* 5. which clause by a subsequent act of 10 *G.* 2. *c.* 32. *s.* 4. is incorporated with the act, commonly called the *Black act* (9 *G.* *c.* 22.) and which has continuance to *Sep* 1. 1757, *&c.* If any person (during the continuance of the said act) shall unlawfully and maliciously break down or cut down the bank of any river, or any sea bank, whereby any lands shall be overflowed or damaged; he shall be guilty of felony without benefit of clergy.

And the hundred shall make satisfaction for the damages, not exceeding 200 *l.* as may be seen more at large under the title Black act.

Piles for securing banks.

3. And moreover, by the statute of 10 *G.* 2. *c.* 32. *s.* 5. If any person shall unlawfully cut off, draw up, or remove and carry away any piles, chalk, or other materials, driven into the ground, and used for the securing any marsh or sea walls, or banks, in order to prevent the lands lying within the same from being overflowed and damaged; on complaint or information thereof made upon oath to any justice residing near the place, such justice shall summon the party complained of, or shall issue his warrant to apprehend and bring such person before him; and upon his appearance,

pearance, or neglect to appear, he shall proceed to examine the fact, and upon due proof thereof made either by confession, or oath of one witness, shall convict the offender; who shall thereupon forfeit 20 *l.* half to the informer, and half to the overseer for the use of the poor, to be levied by distress and sale: For want of sufficient distress, to be committed to the house of correction, to be kept to hard labour for six months.

Bankrupt.

1. LORD *Coke* says, that *banque* in *French* signifies the same as *mensa* in *Latin*; and that *route* is a sign or mark, as we say a cart route is the sign or mark where the cart hath gone; and that metaphorically a *bankrupt*, or *banqueroute*, is taken for him, that hath wasted his estate, and removed his banque so as there is left but a mention thereof. 4 *Inst.* 277. Derivation.

But as the first bankers to us came from *Italy*, it seemeth more probable that they brought their name along with them; and consequently that the word *bankrupt* or *banqeroute* cometh from the Italian *banco rotto*, the *bench* being *broken*. The *banker* himself was so called from the *bench* or table which he used, with his name inscribed, and when he failed, his bench was broken. Which word *rotto* is what remaineth in that country of the Latin *ruptus*; all which, both word and metaphor, we preserve in our language, when we say that a person is *bankrupt*, or that such a one is broken.

2. The description of a bankrupt, within the several statutes brought together into one view, seemeth to be as follows: *Every person using the trade of merchandize, by way of bargaining, exchange, bartry, chevisance, or otherwise, in gross, or by retail, or seeking his trade of living by buying and selling, or that shall use the trade or profession of a scrivener receiving other mens monies or estates into his trust or custody, who shall* (1) *depart the realm*; *or* (2) *begin to keep his house, or otherwise to absent himself*; *or* (3) *take sanctuary*; *or* (4) *suffer himself willingly to be arrested for any debt or other thing not grown or due for money delivered, wares sold, or any other just or lawful cause or good consideration or purposes*; *or* (5) *shall suffer himself to be outlawed*; *or* (6) *yield himself to prison*; *or* (7) *willingly or fraudulently shall procure himself to be arrested, or his goods to be attached or sequestred*; *or* (8) *depart from his dwelling house*; *or* (9) *make any fraudulent grant or conveyance of his lands or goods, to the intent or whereby his creditors shall and may be defeated or delayed for the recovery of their just debts*; *or* (10) *shall obtain any protection, other than such person as shall be lawfully protected by privilege of parliament*; *or* (11) *shall prefer to any court any petition or bill against any of his creditors, thereby endeavouring to inforce them to accept less than their just debts, or to procure time, or longer days of payment than was given at the time of their original contracts*; *or* (12) *being arrested for debt, shall* Description of a bankrupt.

ſhall lie in priſon two months; or (13) *being arreſted for* 100 l. *or more, ſhall eſcape out of priſon,——ſhall be adjudged a bankrupt; (and in the ſaid caſes of arreſt, or lying in priſon, from the time of his firſt arreſt.)* 1 J. c. 15. ſ. 2. 21 J. c. 19. ſ. 2, 15. 10 An. c. 15. ſ. 1.

Uſing the trade of merchandize] But no perſon who ſhall adventure any money in the *Eaſt-India* company, and ſhall receive his dividend in merchandize, and ſhall ſell or exchange the ſame, ſhall be judged thereby a merchant or trader without any ſtatute for bankrupts. 13 & 14 *C.* 2. *c.* 24. *ſ.* 3, 4.

Seeking his trade of living by buying and ſelling] He that buys only, or ſells only, is not within this deſcription. *Read. Bankr.*

Alſo no farmer, grazier, or drover of cattle, ſhall be deemed a bankrupt. 5 *G.* 2. *c.* 30. *ſ.* 40.

Alſo an innkeeper is ſaid not to be a trader within theſe ſtatutes. 1 *Salk.* 110.

It is likewiſe held, that a taylor is not within the ſtatutes of bankrutcy, becauſe he gets not his living by buying and ſelling; but ſhoemakers, weavers, dyers, tanners, and bakers have been held to be within the ſaid ſtatutes. *Read. Bankr.*

Moreover, ſuch farmer, if he ſhall deal in wool, hops, or the like, ſhall be deemed a bankrupt; otherwiſe any perſon by taking a farm, might avoid the ſtatutes. Alſo, an innkeper, if he ſhall buy corn, and ſell the ſame, again in quantities which are not conſumed in his houſe, may become a bankrupt. And in the caſe of *Mayo* and *Archer*, *E.* 8 *G.* A farmer who planted potatoes, but withal bought divers large quantities of potatoes, and ſold the ſame again, was adjudged a bankrupt. *Strange* 513.

Receiving other mens monies or eſtates into his truſt or cuſtody] Bankers, brokers, and factors are within this deſcription. 5 *G.* 2. *c.* 30. *ſ.* 39.

But no receiver general of any taxes granted by act of parliament, ſhall be deemed a bankrupt. 5 *G.* 2. *c.* 30. *ſ.* 40.

For what debts a commiſſion ſhall be iſſued, and what is to be done previous thereto.

3. But notwithſtanding that a perſon may have committed any of the aboveſaid acts of bankruptcy, yet nevertheleſs *no commiſſion of bankrupt ſhall be iſſued, on the petition of one or more creditors, unleſs the ſingle debt of ſuch creditor, or of two or more being partners, amount to* 100 l. *or of two ſuch creditors petitioning amount to* 150 l. *or of three or more to* 200 l.

And the creditor or creditors petitioning, ſhall before the commiſſion ſhall be granted, make affidavit before a maſter in chancery (to be filed with the proper officer) of the truth of the debt, and ſhall alſo give 200 *l.* bond to the lord chancellor for proving the debt as well before the commiſſioners, as upon a trial at law, if the due iſſuing of the commiſſion ſhall be conteſted, and alſo for proving the party a bankrupt, and further to proceed on ſuch commiſſion as hereafter is mentioned: and if it ſhall appear, that the commiſſion was taken out fraudulently, the lord chancellor may order ſatisfaction, and may aſſign ſuch bond to the party injured. 5 *G.* 2. *c.* 30. *ſ.* 23.

4. But

4. But these circumstances abovementioned being observed, then the lord chancellor may on such complaint in writing as aforesaid, by commission under the great seal, appoint such wise and honest discreet persons as to him shall seem good, to be commissioners. 13 *El. c.* 7. *s.* 2. Issuing the commission.

5. Which commissioners, before they act, shall administer to each other the following oath; "I *A. B.* do swear, that I will "faithfully, impartially, and honestly, according to the best of "my skill and knowledge, execute the several powers and trusts "reposed in me as a commissioner in a commission of bankrupt "against ——— and that without favour or affection, prejudice "or malice. So help me god." 5 *G.* 2. *c.* 30. *s.* 43. Commissioners oath.

And they shall keep a memorial thereof, signed by them, amongst the proceedings. *id. s.* 44.

6. Then the commissioners shall cause notice of the commission being issued to be given in the gazette, and likewise notice in writing to be left at the bankrupt's usual place of abode, or personal notice to be given if he is in prison; in which notice also shall be appointed a time and place of meeting of the commissioners, which meeting shall be at three several times within forty-two days, the last of which shall be on the forty-second day; within which time the bankrupt shall surrender, and discover his estate and effects. 5 *G.* 2. *c.* 30. *s.* 1. Notice in the gazette of the commission being issued.

But the lord chancellor may enlarge the time for such surrender and discovery, not exceeding fifty days from the end of the said forty-two days; so as such order be made by him, six days before the expiration of the forty-two. *id. s.* 3.

7. The first meeting shall be for chusing an assignee or assignees of the bankrupt's estate and effects (which in *London* shall be at *Guildhall*). 5 *G.* 2. *c.* 30. *s.* 26. Chusing assignees.

8. But before assignees are chosen, the major part in value of the creditors may direct how and with whom the money to be received shall remain till divided; to which the assignees shall conform, as often as 100*l.* shall be got in. 5 *G.* 2. *c.* 30. *s.* 32. The money with whom to be lodged.

9. And the creditor or creditors who shall sue out the commission, shall prosecute the same at their own expence till assignees be chosen; and the commissioners shall at the meeting for chusing assignees, ascertain such costs, and by writing under their hands order the assignees to reimburse the same, out of the first effects that shall be got in. 5 *G.* 2. *c.* 30. *s.* 25. Expences of the commission.

10. At the said meeting for chusing assignees, the commissioners shall admit the proof of any creditor's debt, that lives remote from the place of meeting, by affidavit; and also permit any person duly authorized by letter of attorney from such creditors (oath being first made of the due execution thereof, either by affidavit sworn before a master in chancery, or before the commissioners *viva voce*; and in case of creditors residing in foreign parts, such affidavits to be made before a magistrate where the party shall be residing, and together with such creditors letters of attorney, to be attested by a notary publick) to vote in the choice of an assignee or assignees in the place of such creditor: And the commissioners shall assign the estate and effects unto such person or persons, Who shall vote for assignees.

ſons, as the major part in value of the creditors, according to the debts then proved, ſhall chooſe. 5 *G.* 2. *c.* 30. *ſ.* 26.

But no creditor ſhall ſo vote, whoſe debt ſhall not amount to 10*l.* *id. ſ.* 27.

Chuſing new aſſignees.

11. And the commiſſioners may from time to time appoint new aſſignees, if the major part of the creditors, whoſe debts amount to 10*l.* ſhall think fit; and the former aſſignees ſhall aſſign to them in ten days after notice of ſuch choice, and of the new aſſignees acceptance thereof, ſignified under their hands; on pain of 200*l.* to the creditors, with full coſts. 5 *G.* 2 *c.* 30. *ſ.* 30.

And the lord chancellor, on petition of any creditors, may order former aſſignments to be vacated, and new aſſignments to be made, of the effects not received; and the commiſſioners ſhall cauſe notice thereof to be given in the two next gazettes, and that the debtors do not pay to the aſſignees removed. *id. ſ.* 31.

Bankrupt to be apprehended.

12. On certificate under the hands and ſeals of the commiſſioners, that ſuch commiſſion is iſſued, and ſuch perſon proved before them to become bankrupt, any judge or juſtice of the peace, ſhall on application to them for that purpoſe made, grant their warrant (A) for the taking and apprehending ſuch perſon, and commit (B) him to the common gaol, there to remain until he be removed by order of the commiſſioners by their warrant. And the gaoler ſhall forthwith give notice to one or more of the commiſſioners, of ſuch perſon being in his cuſtody; whereupon they ſhall ſend their warrant to him to deliver him to the perſon who ſhall be named in the warrant, who ſhall convey him to the commiſſioners to be examined. And the commiſſioners by ſuch or any other their warrant, may ſeize the goods and papers of ſuch bankrupt which ſhall be in any priſon (neceſſary wearing apparel of himſelf, and wife, and children excepted). 5 *G.* 2. *c.* 30. *ſ.* 14.

But if the perſon ſo apprehended ſhall, within the time allowed, ſubmit to be examined, and in all things conform, he ſhall have the ſame benefit as if he had ſurrendred. 5 *G.* 2. *c.* 30. *ſ.* 15.

Bankrupt to deliver up.

13. The bankrupt after aſſignees ſhall be appointed, ſhall deliver up to them on oath (to be adminiſtred by a maſter in chancery, or juſtice of the peace) all his books of account, papers, and writings not ſeized by the meſſenger of the commiſſion, and not before delivered up, and then in his power, and diſcover ſuch as are in the power of others; and, being not in cuſtody, ſhall at all times attend the aſſignees, on reaſonable notice given to him in writing, or left for him at his place of abode, in order to aſſiſt in making out the account of his eſtate. 5 *G.* 2. *c.* 30. *ſ* 4.

Bankrupt to be at liberty to inſpect his papers.

14. And ſuch bankrupt having ſurrendred, ſhall at all ſeaſonable times, before expiration of the forty-two days, or further term, be at liberty to inſpect his papers, in preſence of the aſſignees, or ſome perſon appointed by them, and to bring with him for his aſſiſtance any perſons not exceeding two at a time, and to make extracts from thence, the better to enable him to diſcover his effects. 5 *G.* 2. *c.* 30. *ſ.* 5.

Shall be freed from arreſt.

And in order thereto, he ſhall be free from arreſt or impriſonment of his creditors, in coming to ſurrender, and from his ſurrender,

render, for the ſaid forty-two days or further term; provided he was not in cuſtody at the time of ſurrender. And if he be arreſted for debt, or on an eſcape warrant, coming to ſurrender, or after ſurrender within the ſaid term; then, on producing the notice under the hands of the commiſſioners or aſſignees, to the officer who ſhall arreſt him, and making it appear to ſuch officer that ſuch notice is ſigned by them, and giving the officer a copy thereof, he ſhall be immediately diſcharged: And if any officer ſhall in ſuch caſe detain him, he ſhall forfeit to him for his own uſe 5 *l.* a day, by action of debt, with full coſts. *id.*

Bankrupt in priſon when the commiſſion is iſſued.

15. And if the bankrupt be in priſon or cuſtody at the time of iſſuing the commiſſion, and is willing to ſurrender and be examined, and can be brought before the commiſſioners and creditors, the expence thereof ſhall be paid out of his eſtate: But if he is in execution, or cannot be brought before the commiſſioners, then they ſhall attend him in priſon; and the aſſignees may appoint a perſon to attend him in priſon, and to produce to him his books and papers, in order to prepare his laſt diſcovery and examination; a copy whereof the aſſignees ſhall apply for, and the bankrupt ſhall deliver to them, ten days before ſuch laſt examination. 5 *G.* 2. *c.* 30. *ſ.* 6.

Bankrupt to be examined.

16. And the commiſſioners may examine him (on oath, 21 *J.* *c.* 19. *ſ.* 9.) *as well by word of mouth, as on interrogatories in writing*, touching his trade, dealings, eſtate, and effects; and take down in writing his anſwer to verbal examinations; which he ſhall ſign: And if he ſhall refuſe to anſwer, *or not anſwer fully* all lawful queſtions, or refuſe to ſign the ſame; the commiſſioners may by warrant commit him to priſon without bail, *till he ſhall ſubmit to them, and full anſwer make*, and ſign the ſame; which warrant ſhall ſpecify ſuch queſtions. 5 *G.* 2. *c.* 30. *ſ.* 16, 17.

As well by word of mouth, as on interrogatories in writing] *M.* 4 *G.* 2. *K.* and *Solomon Nathan.* The defendant was committed by the commiſſioners, who in their warrant recite, that he had been examined before them upon his oath, upon which examination he had notoriouſly prevaricated; they therefore commit him without bail or mainprize, until he ſhall make a full and true diſcloſure and diſcovery of his eſtate and effects, or be otherwiſe delivered by due courſe of law. Upon a *habeas corpus* it was moved, that the defendant might be diſcharged. One reaſon whereof was, becauſe the ſtatute requires, that there ſhall be interrogatories exhibited for his examination, that ſo he may have time to conſider of his anſwer, and it can then appear to the court, whether he is bound to anſwer: perhaps this prevarication might be in a matter they had no power to inquire into. And by the court; Interrogatories are a term known in law, and import that the queſtions are put in writing. And they ſaid that *Holt* Ch. J. held, that the bankrupt ought to have a copy, and time to conſider of his anſwer. *Strange* 880.

Or not anſwer fully] In the aforeſaid caſe of *K.* and *Solomon Nathan*, another objection againſt the commitment was, that they commit him, becauſe upon his examination he had *notoriouſly prevaricated*;

varicated; this being too loose an expression, for he might prevaricate, and yet give a full answer at last. And by the court; Where these special authorities are given, the words of the act ought to be pursued. *Strange* 880.

Till he shall submit to them, and full answer make] In the same case, the commitment was, *until he shall make a full and true disclosure and discovery of his estate and effects, or be otherwise delivered by due course of law.* And by the court; This commitment not pursuing the words of the statute, the prisoner must be discharged. *Strange* 880.

M. 8 *W. Bracy*'s case. A commitment *until he should conform himself to their authority*, was adjudged ill, because too general; since they have authority in other matters besides that: and it is best in the like cases, strictly to pursue the statute. L. *Raym.* 100.

Another commitment *till discharged by due course of law*, adjudged ill for the same reason. *id.* 851.

But if on an *habeas corpus* there appear insufficiency in the warrant of commitment, the judge nevertheless shall commit him to the same prison, to remain as aforesaid, unless it be made appear that he hath fully answered all lawful questions, or unless it appear that he had sufficient reason for not signing. 5 *G.* 2. *c.* 30. *s.* 18.

And if the gaoler shall suffer him to escape, or to go without the walls or doors of the prison; he shall, on conviction by indictment or information, forfeit 500 *l.* to the creditors. *id.*

Also the gaoler shall, on request of any creditor who shall have proved his debt, and producing a certificate thereof under the hands of the commissioners, produce and shew him to such creditor; on pain of 100 *l.* to the creditors, by action of debt. *id.* *s.* 19.

Bankrupt not surrendring and conforming, felony.

17. And by the said statute it is enacted, that if he shall not within the said time surrender himself to the commissioners, and sign such surrender, and also submit to be examined from time to time on oath, and in all things conform to the statutes concerning bankrupts, and also on his examination fully discover all his estate, and how disposed of, except what hath been *bona fide* disposed of in the way of his trade and dealings, and except what hath been laid out in the ordinary expence of his family, and also deliver up to them all his effects (except the necessary wearing apparel of himself, and wife, and children); then in case of any default and wilful omission in not surrendring and submitting to be examined, or in case he shall remove, conceal, or embezzle any part of his estate to the value of 20 *l.* or any books of account, or writings relating thereto, with intent to defraud his creditors, and being thereof convicted by indictment or information, he shall be guilty of felony without benefit of clergy, and his estate shall be divided amongst his creditors. 5 *G.* 2. *c.* 30. *s.* 1.

And by the 20 *G.* 2. *c.* 52. All offences by bankrupts made felony by the several acts concerning bankruptcy, are excepted out of the general pardon.

18. And

18. And every person who shall accept any trust, or conceal any estate of the bankrupt, and shall not in forty-two days after issuing the commission, and notice thereof in the gazette, discover the same in writing to one or more commissioners or assignees, and submit himself to be examined; shall forfeit to the creditors 100 *l.* and double value of the estate concealed, by action of debt, with full costs. 5 *G.* 2. *c.* 30. *s.* 21. Other persons concealing the bankrupt's effects.

19. Also the commissioners may examine on oath the bankrupt's wife, like as other persons. 21 *J.* *c.* 19. *s.* 5, 6. Bankrupt's wife may be examined.

20. As also they may examine in like manner every other person, duly summoned before, or present at their meeting, touching the person, trade, dealings, estate, and effects of the bankrupt, and any acts of bankruptcy by him committed; and may take down in writing the answers of verbal examinations, which the party shall sign: And if any of them shall refuse to answer, or not answer fully all lawful questions, or refuse to sign the same, the commissioners may by warrant commit him to prison without bail, till he shall submit to them, and full answer make, and sign the same; in like manner as is said before in section the 16th concerning the bankrupt himself. 5 *G.* 2. *c.* 30. *s.* 16, 17, 18, 19. And every other person.

21. The said commissioners shall have power, by their discretions to take such order with the lands of such bankrupt, as well copy or customary hold as freehold, which he had in his own right before he became a bankrupt; or which he purchased jointly with his wife or child to the only use of such offender, or for such use or interest as he may lawfully part with; or with any person of trust to any secret use of such offender; and also with all his money, goods, chattels, wares, merchandizes, and debts; and cause all the same to be searched and appraised to the best value they may; and the same to be sold by deed indented, and inrolled in a court of record; or otherwise ordered for payment of the creditors, to every creditor a portion rate like, according to the quantity of his debts. 13 *El.* *c.* 7. *s.* 2. Bankrupt's estate how to be ordered.

And if any lands or goods shall descend or come to the bankrupt afterwards, before the debts be fully paid; the same shall be disposed of in like manner. 13 *El.* *c.* 7. *s* 11.

But this shall not extend to lands assured by such person before he becomes bankrupt; provided the assurance be made *bona fide*, and not to his own use only, or of his heirs; and that the party to whose use they are assured, be not privy to the fraudulent purpose of the bankrupt to deceive his creditors. 13 *El.* *c.* 7. *s.* 12. Lands sold bona fide.

Also the commissioners may by deed indented, and inrolled at *Westminster* in six months, sell the bankrupt's estate in tail, whereof no reversion or remainder is in the king, or of the king's gift; which sale shall be good against all persons, whom the bankrupt by common recovery, or otherwise, might cut off. 21 *J.* *c.* 19. *s.* 12. Estate tail.

Also if the bankrupt hath conveyed any estate, on condition, or power of redemption, at a day to come, by payment of money, or otherwise; the commissioners before the time of the performance of such condition, may appoint under their hands and seals any person to make tender or payment of money, or other performance, Estate mortgaged.

mance, as fully as the bankrupt might have done; and may dispose of the estate redeemed for the use of the creditors, as fully as any other estate of the bankrupt. 21 *J. c.* 19. *s.* 13.

Customary lands to pay fine.

Persons purchasing copyhold or customary lands shall pay fine to the lord of the manor, who shall thereupon admit them. 13 *El. c.* 7. *s.* 4.

Commissioners may break open doors.

22. Commissioners and others by warrant under their hands and seals, may break open the bankrupt's houses, doors, trunks, and chests, where he or any of his goods shall be reputed to be, and seize upon, and order his body and goods as before is said. 21 *J. c.* 19. *s.* 8.

Bankrupt fraudulently conveying.

23. If the bankrupt shall convey to any of his children, or other person, any lands or goods, or transfer his debts into other mens names, except the same be conveyed or transferred on marriage of any of his children, or for some valuable consideration; the same may be disposed of in like manner. 1 *J. c.* 15. *s.* 5.

And if the bankrupt shall on his examination be found fraudulently to have conveyed his lands, goods, or estate, to the value of 20l. to defraud his creditors, and shall not discover the same, and (if it lie in his power) deliver the same to the commissioners; or if he cannot make it appear to the commissioners that he hath sustained some casual loss whereby he is disabled to pay what he oweth; he shall, on conviction upon indictment at the assizes or sessions, be set on the pillory in some publick place for two hours, and have one of his ears nailed to the pillory, and cut off. 21 *J. c.* 19. *s.* 7.

Bankrupt compounding with the person suing out the commission.

24. And if any bankrupt, after issuing the commission, shall compound with the person suing out the same, for more than his proportion with the rest of the creditors; such commission may be superseded, and the lord chancellor may award to any creditor petitioning another commission, and the person so compounding shall lose his whole debt, and deliver up to the new commissioners all he shall have so received, for the use of the other creditors. 5 *G.* 2. *c.* 30. *s.* 24.

Debtor paying to a bankrupt.

25. If a debtor to a bankrupt pays him voluntarily, he must pay it over again; but it is otherwise, if he pays him by compulsion of law. *Read. Bankr.*

Money received of a bankrupt.

26. But no real creditor of a bankrupt shall be liable to refund to the assignees, any money which before the suing forth the commission was in course of trade received by him of the bankrupt, before he had knowledge of the person's becoming a bankrupt, or being insolvent. 19 *G.* 2. *c.* 32. *s.* 1.

Purchaser not to be impeached after five years.

27. And no purchaser for valuable consideration shall be impeached, unless the commission be sued out in five years after the person shall become bankrupt. 21 *J. c.* 19. *s.* 14.

Bankrupts conveying their goods, and keeping possession.

28. If the bankrupt, at the time he shall become bankrupt, shall by consent of the true owner, have in his possession and disposition any goods whereof he shall be reputed owner, and take upon him the sale or disposition thereof as owner; the commissioners may dispose of the same, as fully as any other part of the bankrupt's estate. 21 *J. c.* 19 *s.* 11.

29. If

29. If any eſtate of the bankrupt be extended after he is become bankrupt, by any perſon under pretence of his being an accountant or indebted to the king; the commiſſioners may examine on oath, whether the ſaid debt were due to ſuch debtor or accountant, on any contract originally made between ſuch accountant and the bankrupt; and if it was made with any other perſon than the ſaid accountant, or for the uſe of any other perſon, the commiſſioners proceedings ſhall be available againſt the ſaid extent. 21 *J. c.* 19. *ſ.* 10. Debt due to the king.

30. The commiſſioners or aſſignees may ſtate accounts between the bankrupt and his debtors or creditors, and ſet one debt againſt another, and the balance only ſhall be paid on either ſide. 5 *G.* 2. *c.* 30. *ſ.* 28. Commiſſioners may ſtate accounts.

31. Alſo the aſſignees, with conſent of the major part in value of the creditors preſent at a meeting purſuant to notice to be given in the gazette, may ſubmit diſputes relating to the bankrupt's eſtate to arbitration; and may compound for debts owing to the bankrupt. 5 *G.* 2. *c.* 30. *ſ.* 34, 35. May refer to arbitration, and compound.

32. Two joint traders, one of them became a bankrupt: By *Holt* Ch. J. the commiſſioners cannot meddle with the intereſt of the other, for it is not affected by the bankruptcy of his companion. 3 *Salk.* 61. Partner not affected.

33. Every perſon who ſhall, after the time of ſurrender, voluntarily make diſcovery to the commiſſioners or aſſignees, of any part of the bankrupt's eſtate, not before come to the knowledge of the aſſignees, ſhall have 5 *l. per cent.* and ſuch further reward as the aſſignees and the major part of the creditors in value, preſent at any meeting, ſhall think fit. 5 *G.* 2. *c.* 30. *ſ.* 20. Reward for diſcovering.

34. Every creditor ſhall be at liberty to prove his debt, without paying any thing for the ſame. 5 *G.* 2. *c.* 30. *ſ.* 25. Creditor may prove his debt gratis.

35. And at the meeting for chuſing aſſignees, (as hath been ſaid) the commiſſioners ſhall admit the proof of any creditor's debt, that lives remote from the place of meeting, by *affidavit*. 5 *G.* 2. *c.* 30. *ſ.* 26. By affidavit.

36. Creditors having ſecurity by judgment, ſtatute, recognizance, ſpecialty with penalty or without, or other ſecurity, or having no ſecurity, or having made attachments in *London* or elſewhere by any cuſtom, of the goods of ſuch bankrupt, whereof there is no execution or extent ſerved and executed upon the lands, goods, or eſtate of ſuch bankrupt before he ſhall become bankrupt, ſhall not be relieved for more than a rateable part with the other creditors, notwithſtanding any penalty or greater ſum contained in ſuch ſecurity. 21 *J. c.* 19. *ſ.* 9. Perſons having ſecurity, to have only their ſhare.

37. Perſons taking ſecurities payable at a future day, for goods delivered to perſons who ſhall become bankrupts before the time of payment, ſhall be admitted to prove their ſecurities, and receive their proportion, deducting intereſt from the time of payment to the time it would have become due. 7 *G. c.* 31. *ſ.* 1, 2. Securities for money not become due.

38. The obligor in any bottom-ree, or *reſpondentia* bond, and the aſſured in a policy of inſurance, ſhall be admitted to claim; and after the loſs or contingency, to prove the debt thereon, in Bottom-ree inſurance.

like manner as if the ſame had happened before iſſuing the commiſſion. 19 *G.* 2. *c.* 32. *ſ.* 2.

Mortgagee. 39. The mortgagee may chuſe whether he will come in as a creditor. *Read. Bankr.*

Execution. 40. But the plaintiff that hath the defendant's body in execution, ſhall not come in to be relieved. *Read. Bankr.*

Swearing to a falſe debt. 41. If any perſon ſhall ſwear that any ſum is due to him from the bankrupt, which is not due, or more than is due; he ſhall ſuffer as in caſes of perjury, and moreover forfeit double to the creditors. 5 *G.* 2. *c.* 30. *ſ.* 29.

Aſſignees to keep books. 42. The aſſignees ſhall keep books of account of all ſums and effects received; which every creditor who hath proved his debt may inſpect at all ſeaſonable times. 5 *G.* 2. *c.* 30. *ſ.* 26.

First dividend. 43. The aſſignees ſhall, after four months, and within twelve months after iſſuing the commiſſion, cauſe at leaſt twenty-one days notice to be given in the gazette, of the time and place the commiſſioners and aſſignees intend to meet to make a dividend; at which time, the creditors who have not before proved their debts, may prove them: and the aſſignees ſhall produce fair accounts, and be ſworn to them before the commiſſioners, if required by the creditors; and they ſhall be allowed therein all reaſonable expences. And the commiſſioners may then order, under their hands, a diſtribution; which order ſhall contain the time and place of making it, and the total of the debts proved, and of the money in the hands of the aſſignees, and how much in the pound ſhall be then diſtributed; one part of which order ſhall be filed among the proceedings under the commiſſion, and each of the aſſignees ſhall have a duplicate thereof. And the aſſignees ſhall take receipts for the ſame, in a book to be kept for that purpoſe. 5 *G.* 2. *c.* 30. *ſ.* 33.

Allowance to the bankrupt. 44. The bankrupt ſurrendring and conforming, ſhall be allowed 5 *l. per cent.* if after ſuch allowance, the neat produce of his eſtate will pay 10 *s.* in the pound; ſo as the ſaid 5 *l. per cent.* amount not to above 200 *l.* 5 *G.* 2. *c.* 30. *ſ.* 7.

And if the neat produce will pay 12 *s.* 6 *d.* in the pound; he ſhall be allowed 7 *l.* 10 *s. per cent.* ſo as it amount not to above 250 *l. id.*

And if it will pay 15 *s.* in the pound, he ſhall be allowed 10 *l. per cent.* ſo as it exceed not 300 *l.* and ſuch bankrupt ſhall be diſcharged from all debts by him owing at the time he became bankrupt: And if he ſhall be arreſted or proſecuted for any debt due before ſuch time, he ſhall be diſcharged on common bail, and may plead in general, that the cauſe of action did accrue before he became bankrupt, and may give this act, and the ſpecial matter in evidence; and the certificate of his conforming (as hereafter mentioned), and allowance thereof, ſhall be ſufficient evidence of the trading, bankruptcy, commiſſion, and other proceedings precedent to the obtaining the certificate; and a verdict ſhall paſs for the defendant, unleſs the plaintiff can prove that the certificate was obtained fraudulently, or can make appear a concealment by the bankrupt to the value of 10 *l.* And if the plaintiff is caſt, the defendant ſhall have full coſts. *id.*

But if any commiſſion of bankruptcy ſhall iſſue againſt any perſon who ſhall have been diſcharged by this act, or ſhall have compounded with his creditors, or delivered to them his eſtate, and been releaſed by them, or been diſcharged by an act of inſolvency; then the body only of ſuch perſon conforming ſhall be free from arreſt and impriſonment, but his future eſtate ſhall remain liable to his creditors (his tools of trade, neceſſary houſhold goods and furniture, and neceſſary wearing apparel of himſelf and wife and children only excepted), unleſs the eſtate of ſuch perſon ſhall produce clear of all charges 15 *s.* in the pound. *id. ſ.* 9.

If the neat produce will not pay 10 *s.* in the pound, the bankrupt ſhall be allowed ſo much as the aſſignees and commiſſioners ſhall think fit, not exceeding 3 *l. per cent. id. ſ.* 8.

Certificate and allowance thereof.

45. But no diſcovery on oath ſhall intitle the bankrupt to the ſaid allowance, unleſs the commiſſioners ſhall, under their hands and ſeals, certify to the lord chancellor, that he hath made a full diſcovery of his eſtate, and in all things conformed himſelf; and that there doth not appear to them any reaſon to doubt of the truth of ſuch diſcovery, or that the ſame is not a full diſcovery; and unleſs four parts in five in number and value of the creditors, who ſhall be creditors for not leſs than 20 *l.* and who have proved their debts, or ſome perſon by them authorized thereto, ſhall ſign ſuch certificate, and teſtify their conſent to ſuch allowance and certificate, and to the bankrupt's diſcharge, to be alſo certified by the commiſſioners; but the commiſſioners ſhall not certify the ſame, till they have proof by affidavit of ſuch creditors, or of the perſon by them reſpectively authorized, ſigning the ſaid certificate, and of the power by which any perſon is ſo authorized (and the letter of attorney of a creditor reſiding in foreign parts, atteſted by a notary publick, ſhall be ſufficient evidence in ſuch caſe of ſuch power, 24 *G.* 2. *c.* 57. *ſ.* 10.) Which ſaid affidavit, together with ſuch power to ſign, ſhall be laid before the lord chancellor with the certificate in order for allowing the ſame;—and unleſs the bankrupt make oath, that the certificate and conſent of the creditors were obtained fairly and without fraud; and unleſs the certificate ſhall, after ſuch oath, be allowed and confirmed by the lord chancellor, or two of the judges to whom he ſhall refer it: and any of the creditors ſhall be allowed to be heard againſt making the certificate, and againſt the confirmation of it: nor ſhall any commiſſioner ſign the certificate, till after four parts in five in number and value of the creditors ſhall have ſigned it. 5 *G.* 2. *c.* 30. *ſ.* 10.

And every ſecurity given to the uſe of any creditor, to induce him to ſign ſuch allowance or certificate, ſhall be void. *id. ſ.* 11.

Moreover, no bankrupt ſhall be intitled to ſuch allowance, who hath upon marriage of any child given above 100 *l.* unleſs he prove by his books, or upon his oath, that he had remaining at the time ſufficient to pay his debts; or who hath loſt in one day the value of 5 *l.* or in the whole the value of 100 *l.* in 12 months next before his becoming bankrupt, at cards, dice, tables, tennis, bowls, billiards, ſhovelboard, cock-fighting, horſe-

races, dog-matches, foot-races, or other paſtime or game, or in bearing a part in the ſtakes, or by betting; or hath in 12 months before loſt 100*l.* by contracts for the ſtock of any company, or publick funds, where the contract was not to be performed within a week, or where the ſtock was not actually transferred. 5 *G.* 2. *c.* 30. *ſ.* 12.

And moreover, by 24 *G.* 2. *c.* 57. When any perſon ſhall fraudulently ſwear, before the major part of the commiſſioners, or by affidavit exhibited to them, that a ſum of money is due to him from the bankrupt, which ſhall in fact not be really owing; and ſhall, in reſpect of ſuch fictitious debt, ſign the certificate for ſuch bankrupt's diſcharge; in ſuch caſe, unleſs the bankrupt ſhall, before the major part of the commiſſioners have ſigned the certificate, by writing ſigned by him and delivered to one or more of the commiſſioners or aſſignees, diſcloſe the fraud, and object to the reality of ſuch debt, the certificate ſhall be void, and the bankrupt ſhall not be intitled to his diſcharge or allowance. *ſ.* 9.

Bankrupt's duty after allowance.

46. The bankrupt, after allowance of the certificate, ſhall attend on notice in writing from the aſſignees, to ſettle accounts, and ſhall have 2 *s.* 6 *d.* a day allowed for attendance; and if he ſhall neglect or refuſe, he ſhall, on oath made by the aſſignees before the commiſſioners, be apprehended and committed to cloſe gaol, by warrant of the ſaid commiſſioners, till he conform. 5 *G.* 2. *c.* 30. *ſ.* 36.

Commiſſioners pay.

47. To prevent expences, no money ſhall be paid out of the effects for eating or drinking of the commiſſioners, or of any other perſon; nor ſhall the commiſſioners have above 20 *s.* each for each meeting; nor any ſchedule be annexed to the deed of aſſignment: Commiſſioners acting contrary hereto, ſhall be diſabled for ever to act as ſuch. 5 *G.* 2. *c.* 30. *ſ.* 42.

Half fees on renewing the commiſſion.

48. If by the death of commiſſioners, or otherwiſe, it be neceſſary to renew the commiſſion, half fees only ſhall be paid. 5 *G.* 2. *c.* 30. *ſ.* 45.

Attorney's bill.

49. All bills of fees or diſburſements demanded by any ſolicitor, clerk, or attorney, ſhall be ſettled and certified by a maſter in chancery, who ſhall have for the ſame 20 *s.* 5 *G.* 2. *c.* 30. *ſ.* 46.

Bankrupt dying.

50. Bankrupt dying before diſtribution, ſhall not hinder the diſtribution. 1 *J.* *c.* 15. *ſ.* 17.

Second dividend.

51. In 18 months after iſſuing the commiſſion, the aſſignees ſhall make a ſecond dividend, and ſhall cauſe notice to be inſerted in the gazette of the time and place the commiſſioners intend to meet to make a ſecond diſtribution, and for the creditors who have not proved their debts to come and prove them: And at ſuch meeting, the aſſignees ſhall produce their account on oath, and what is in their hands ſhall by order of the commiſſioners be forthwith divided. Which ſecond dividend ſhall be final, unleſs a ſuit in law or equity be depending, or part of the eſtate ſtanding out that cannot have been diſpoſed of, or that the major part of the creditors ſhall not have agreed to be ſold, or unleſs ſome other or future eſtate of the bankrupt ſhall come to the aſſignees; which they ſhall, as ſoon as may be, convert into money, and in two months diſtribute the ſame in like manner. 5 *G.* 2. *c.* 30. *ſ.* 37.

But

But no ſuit in equity ſhall be commenced by the aſſignees, without conſent of the major part in value of the creditors, who ſhall be preſent at a meeting of the creditors purſuant to notice in the gazette. *id. ſ.* 38.

52. If the bankrupt ſhall be taken in execution, or detained in priſon, for debt owing before his bankruptcy, by reaſon that judgment was obtained before the certificate was allowed and confirmed; any judge of the court, on producing the certificate, may order him to be diſcharged without fee. 5 *G.* 2. *c.* 30. *ſ.* 13. Bankrupt's diſcharge.

53. But by the diſcharge of a bankrupt from the debts owing by him at the time he became a bankrupt, his partner ſhall not be diſcharged, but ſhall be liable as if the bankruptcy had not been. 10 *An. c.* 15. *ſ.* 3. Partner not diſcharged.

54. The commiſſioners ſhall, on lawful requeſt of the bankrupt, declare how they have beſtowed his lands and goods, and pay to him the overplus, if any there be. 13 *El. c.* 7. *ſ.* 4. Commiſſioners to account, and pay the overplus.

55. On petition to the lord chancellor, he may order the proceedings to be entred of record, to be at any time ſearched and produced as evidence. 5 *G.* 2. *c.* 30. *ſ.* 41. Proceedings to be entred of record.

56. Commiſſioner ſued for any thing done on the ſtatutes of 13 *El.* and 1 *J.* may plead the general iſſue; and if he recovers, ſhall have his coſts. 1 *J. c.* 15. *ſ* 16. But there is no proviſion for any thing done by them, or by the aſſignees, on any of the ſubſequent ſtatutes. Remedy on commiſſioner being ſued.

57. The commiſſion ſhall not abate by the death of the king. 5 *G.* 2. *c.* 30. *ſ.* 45. King's death not to abate the commiſſion.

Note; The act of 5 *G.* 2. *c.* 30. ſo often mentioned above, is but temporary, and by the laſt continuance is of force till *Sep.* 1. 1757, *&c.*

A. Warrant to apprehend a bankrupt.

Weſtmorland. { To ———.

WHEREAS *a certificate under the hands and ſeals of* ——— *hath this day been produced before me* ——— *ſetting forth that a commiſſion of bankruptcy is iſſued againſt* ——— *and that the ſaid* ——— *is proved before them the ſaid* ——— *being the major part of the commiſſioners authorized in the ſaid commiſſion, to be a bankrupt; and whereas application hath been made to me by* ——— *by order of the ſaid commiſſioners, for the apprehending the ſaid* ——— *Theſe are therefore to require you, on ſight hereof, to take and apprehend the ſaid* ——— *and bring him before me or ſome other of his majeſty's juſtices of the peace for the ſaid county, to be proceeded againſt according to law. Given under my hand and ſeal this* ——— *day of* &c.

B. Commitment thereupon.

Weſtmorland. { To the keeper of the common gaol at ——.

I *Send to you herewith* —— *being duly certified to be a bankrupt, requiring you to keep him in the ſaid gaol until he ſhall be diſcharged according to law. Given* ——.

Bargain and Sale. See Inrollment.

Barratry.

I. What it is.
II. How puniſhed.

I. What it is.

THIS word *barratry* we have received either from the *Danes*, or *Normans*, or both: for *baratta* in the *Daniſh*, and *baret* in the *Norman*, do equally ſignify a quarrel or contention.

And a *barrator*, in legal acceptation, doth ſignify *a common mover, exciter, or maintainer of ſuits or quarrels, either in courts, or in the country.* 1 Inſt. 368. 1 Haw. 243.

A common mover] It ſeems clear, that no one can be a barrator in reſpect of one act only; for every indictment for ſuch crime muſt charge the defendant with being a *common barrator*. 1 *Haw.* 243, 4.

Mover, exciter, or maintainer] Yet it ſeemeth, that an attorney is in no danger of being judged guilty of an act of barratry, in reſpect of his maintaining another in a groundleſs action, to the commencing whereof he was no way privy. 1 *Haw.* 243.

Alſo, it hath been holden, that a man ſhall not be adjudged a barrator, in reſpect of any number of falſe actions brought by him in his own right: for in ſuch caſes he is liable to coſts. 1 *Haw.* 243.

In courts] Either courts of record; or not of record, as in the county, hundred, or other inferior courts. 1 *Inſt.* 368.

Or in the country] In three manners: 1. In diſturbance of the peace. 2 In taking or keeping of poſſeſſions of lands in controverſy, not only by force, but alſo by ſubtilty and deceit, and moſt commonly in ſuppreſſion of truth and right. 3. By falſe inventions, and ſowing of calumniations, rumors, and reports, whereby diſcord and diſquiet may grow between neighbours. 1 *Inſt.* 368.

II. How

II. How punished.

By the statute of 34 *Ed.* 3. *c.* 1. *The justices of the peace shall have power to restrain all barrators, and to pursue, arrest, take, and chastise them, according to their trespass or offence.*

And altho' this statute doth not create the offence, but supposes it at common law, and only appoints the punishment, yet an indictment of barratry, concluding *against the form of the statute*, is holden to be good, and agreeable to many precedents. *Cro. Eliz.* 148. 1 *Haw.* 244.

But it hath been resolved, that such indictment is not good, without also concluding *against the peace*; for this is an essential part of it, as being an offence by the common law. 1 *Haw.* 244.

And it hath been holden, that an indictment of this kind may be good, without alledging the offence at any certain *place*; because from the nature of the thing, consisting of the repetition of several acts, it must be intended to have happened in several places; for which cause it is said, that a trial ought to be by a jury from the body of the county. 1 *Haw.* 244.

Which case, and that of a common scold, seem to be the only offences for which a general indictment will lie, without shewing any of the particular facts in the indictment; for barratry is an offence of a complicated nature, consisting in the repetition of divers acts in disturbance of the peace, and it would be too prolix to enumerate them in the indictment; and therefore experience hath settled it to be sufficient to charge a man generally as a common barrator, and before the time to give the defendant a note of the particular matters which are intended to be proved against him; for otherwise it will be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances; and therefore the court generally will not suffer the prosecution to go on in the trial of the indictment, without such note being given to the defendant. 1 *Haw.* 244. 2 *Haw.* 226, 7.

As to the kind and manner of punishment, it is said, that if the offender be a common person, he shall be fined and imprisoned, and bound to his good behaviour; and if he be of any profession relating to the law, that he ought also to be farther punished, by being disabled to practice for the future. 1 *Haw.* 244.

Warrant for a barrator.

Westmorland. { To the constable of ———.

WHEREAS *complaint upon oath hath been made unto me* ——— *one of his majesty's justices of the peace in and for the said county, that* A. O. *of* ——— *in the said county, yeoman, on the* ——— *day of* ——— *in the* ——— *year of the*

reign of ——— and on divers other days and times as well before as afterwards, at ——— aforesaid in the county aforesaid, and at divers other places within the county aforesaid, was and yet is a common barrator, and daily disturber of the peace of our sovereign lord the king, and also a common brawler, wrangler, fighter, scandalizer, and sower of seditions, suits, and discords between his neighbours, and other the liege people and subjects of our said sovereign lord the king, to the great damage and disturbance of the said liege people and subjects of our said lord the king, and against the peace of our said lord the king, and to the evil example of all others in the like case offending: These are therefore to command you forthwith to bring the said A. O. *before me to answer unto the said complaint, and to find sureties for his personal appearance at the next general quarter sessions of the peace to be holden for the said county, then and there to answer unto an indictment on the behalf of our said sovereign lord the king to be preferred against him for the said offences. Hereof fail not upon the peril that shall ensue thereon. Given under my hand and seal the ——— day of ———.*

Bastards.

Concerning the settlement of bastard children. See title Poor.

I. Who shall be deemed a bastard.
II. Securing the reputed father till the filiation shall be made.
III. Order of filiation, and appealing therefrom.
IV. Punishment of the mother and reputed father.
V. Mother or reputed father running away.
VI. Murdering a bastard child.
VII. Capacity of a bastard child as to inheritance.

I. Who shall be deemed a bastard.

Meaning of the word bastard.

1. THE word *bastard* seemeth to have been brought unto us by the *Saxons*; and to be compounded of *base*, vile or ignoble, and *start*, or *steort* signifying a rise or original. By the common people in the north (amongst whom is preserved much of the ancient *Saxon*) it is still pronounced *bastart*, denoting a person sprung from a vile or spurious origin; even as an *upstart* is a person suddenly risen from a mean extraction in general.

2. Lord

2. Lord *Coke* says, We term all by the name of bastards that are born out of lawful marriage. By the common law, if the husband be within the four seas, that is, within the jurisdiction of the king of *England*, if the wife hath issue, no proof is to be admitted to prove the child a bastard, unless the husband hath an apparent *impossibility* of procreation, as if the husband be but eight years old, or under the age of procreation, such issue is bastard, albeit he be born within marriage. But if the issue be born within a month, or a day, after marriage, between parties of full lawful age, the child is legitimate. 1 *Inst.* 244. Bastard born in lawful marriage.

M. 6 *G.* 2. *Lomax* and *Holmden*. In ejectment the question on a trial at bar was, whether the lessor was son and heir of *Caleb Lomax*, esquire, deceased; which depended on the question of his mother's marriage. And that being fully proved, and evidence given of the husband's being frequently at *London*, where the mother lived, so that access must be presumed; the defendants were admitted to give evidence of his inability from a bad habit of body. But their evidence not going to an *impossibility*, but an *improbability* only; that was not thought sufficient, and there was a verdict for the plaintiff. *Strange* 940.

And it is said, that formerly if the husband was within the four seas, no proof of *non-access* to his wife was admitted, but the child was deemed to be his; but as this notion was built on no rational foundation, it is now intirely departed from; and though the husband and wife are both in *England*, if there is sufficient proof that he had no access to her, the child will be a bastard. And this was determined, in the case of *Pendrell* and *Pendrell*, *M.* 5 *G.* 2. which was an issue out of chancery, to try whether the plaintiff was the heir at law of one *Thomas Pendrell*. It was agreed, that the plaintiff's father and mother were married, and cohabited for some months; that they parted, she staying in *London*, and he going into *Staffordshire*; that at the end of three years the plaintiff was born. And there being some doubt upon the evidence, whether the husband had not been in *London* within the last year, it was sent to be tried. And the plaintiff rested at first upon the presumption of law in favour of legitimacy, which was encountered by strong evidence of no access. And it was agreed by court and counsel, on the trial at *Guildhall* before Lord Ch. J. *Raymond*, that the old doctrine of being within the four seas was not to take place, but the jury were at liberty to consider of the point of access, which they did, and found against the plaintiff. And the court of chancery acquiesced in the determination. *Strange* 925. *Andr.* 9.

T. 10 *G.* 2. *K.* and the Inhabitants of *Bedall* in *Yorkshire*. An order was made upon one *Moor*, as the putative father of two bastards, born of the body of *Elizabeth* the wife of *Richard Sharpless*: in which it is stated, that for seven years before, the husband had had no access to her, she having never seen or heard of him all that time, and not knowing whether he was alive or dead; which the justices adjudge to be true, and that *Moor* is the father of them, and order him to provide accordingly. Upon appeal to the sessions, the case is stated with some variation: that in 1728, she was married

ried to *Sharpless*, then a soldier in *Mullins*'s troop, in a barn, by a person not in the habit of a clergyman; that there had been no access for seven years: but it appearing by a certificate from the commissary general's office, and from the evidence of *Simon Clarkson*, that one *Richard Sharpless*, who he was told was formerly in *Mullins*'s troop, was mustered as a private gentleman in the third troop of horse guards, from *June* 25. 1733 to *Feb* 23. 1736. though *Clarkson* said he could not take upon him to swear that it was the same *Richard Sharpless* pretended to be married as aforesaid; upon this supposition of the husband's being alive, the sessions were of opinion, the children were not bastards, and reversed the order of the two justices. And now upon debate, the order of sessions was quashed, and the order of two justices confirmed: for it being stated in both orders, that there was no access, according to the case of *Pendrell* and *Pendrell*, it was immaterial whether the husband was alive or not. *Strange* 1076.

And, *M.* 10 *W. K.* and *Abberton*. The case was, a feme covert, during the absence of her husband at *Cadiz*, was brought to bed of a bastard; and her husband was not in *England* from the time of her conception, till she was brought to bed. The question was, whether this child was a bastard, especially within the words of the statute of the 18 *Eliz.* (hereafter following) which saith, *children begotten and born out of lawful matrimony*; which cannot be said of this case, the mother being married at the time of the birth of the child; and if such a mother should kill such a child, she could not be guilty of murder within the statute of the 21 *J.* c. 27. But by the court; He is a bastard who is begotten and born of a feme covert, whilst the husband is beyond the four seas. And in a real action, if general bastardy was pleaded, the bishop ought to certify such a one a bastard. And where a man is bastard, he is such to all purposes, and why not within the 18 *El.* For though the statute of 21 *J.* is a penal law, yet the act of 18 *El.* is a remedial law. L. *Raym.* 395, 396.

How far the wife's oath shall be admitted in such case.

3. But this non access of the husband ought to be proved otherwise than upon the wife's oath; as in the following case: *M.* 8 *G.* 2 *K.* and *Reading*. The defendant *Reading* was adjudged by an order of bastardy, to be the putative father of a bastard child, begotten of the wife of one *Almont* of *Sherborn*. The said woman, on the appeal, gave evidence, that the said *Reading* had carnal knowledge of her body in or about *August* 1732, and several times since; and that her husband had no access to her from *May* 1731, to the time of her examination in that court, being the 3d of *Oct.* 1733. and that the said *Reading* was the father of the said child. And the question on removal of the same into the king's bench was, whether the wife in this case could be admitted as an evidence for or against her husband, and to bastardize her own child. And the whole court were of opinion, that the wife could be a witness to no other fact but that of incontinence, and that this she must be admitted to be a witness to from the necessity of the thing; but not to the absence of her husband, which might properly be proved by other witnesses; and likened it to the case of hue and cry, where the person robbed shall be

be admitted a witness of the fact of robbery, but not to prove any other matter relating thereto, as in what hundred the place was, and the like, because that may be proved by others. *Sess. C. V.* 2. 175.

But in the case of *K.* and *Bedall* abovementioned, The order reciting, that on the examination of the mother, *and on other proof*, it appeared, that her husband had no access to her, was held to be good; for there the woman's oath is not set forth as the only evidence, but *other proof*, which must be intended legal proof. *Andr.* 8.

Child born during a divorce.

4. *M.* 5 *An.* St. *George*'s and St. *Margaret*'s *Westminster*. Where a woman is separated from her husband by a divorce *a mensa & thoro*, the children she has during the separation are bastards; for a due obedience to the sentence shall be intended, unless the contrary be shewed: but if a husband and wife, without sentence, do part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved, for access shall be intended. But if a special verdict find the man had no access, it is a bastard; and so was the opinion of Lord *Hale*, in the case of *Dickens* and *Collins*. 1 *Salk.* 123.

Widow having a child after her husband's death.

5. The law hath appointed no exact certain time, for the birth of legitimate issue, by the widow after the death of her husband. 1 *Danv.* 726.

M. 7 *J. Alsop* and *Bowtrell*. The question was, whether, the woman being delivered of a child forty weeks and nine days after the death of her husband, such child should be deemed a bastard. And it was proved, that her deceased husband's father did much abuse her, and caused her to lie in the streets; and three physicians (two of them being doctors of physick) made oath, that the child came in time convenient to be the child of the party who died; and that the usual time for a woman to go with child, is nine months and ten days, to wit, solar months, at thirty days to the month, and not lunar months; and that by reason of the want of strength in the woman or the child, or by reason of ill usage, she might be a longer time, *viz.* to the end of ten months or more. And the physicians further affirmed, that a perfect birth may be at seven months, according to the strength of the mother or child, which is as long before the time of the proper birth. And by the same reason it may be as long deferred by accident, which is commonly occasioned by infirmities of the body, or passions of the mind. And the child was adjudged to be legitimate. *Cro. Ja.* 541.

II. Securing the reputed father till the filiation shall be made.

By the 6 *G.* 2. *c.* 31. *If any single woman shall be delivered of a bastard child, which shall be chargeable, or likely to become chargeable, to any parish or extraparochial place; or shall declare her self to be with child, and that such child is likely to be born a bastard, and to be chargeable to any parish or extraparochial place, and shall in either of such cases, in an examination* (A) *to be taken*

in

in writing, upon oath, before one justice of the county, city, or town corporate, where such parish or place shall lie, charge any person with having gotten her with child, it shall be lawful for such justice, upon application made to him by the overseers of the poor of such parish, or one of them, or by any substantial householder of such extraparochial place, to issue out his warrant (B) *for the immediate apprehending such person so charged as aforesaid, and for bringing him before such justice, or before any other of his majesty's justices of the peace of such county, city, or town corporate: And the justice before whom such person shall be brought, shall commit* (C) *him to the common gaol or house of correction, unless he shall give security* (D) *to indemnify such parish or place, or shall enter into a recognizance* (E) *with sufficient surety, upon condition to appear at the next general quarter sessions, or general sessions, of the peace, to be holden for such county or liberty, and to abide and perform such order or orders as shall be made, in pursuance of an act passed in the 18th year of the reign of her late majesty queen* Elisabeth, *concerning bastards begotten and born out of lawful matrimony.* s. 1.

Issue out his warrant for the immediate apprehending] If the constable, having a warrant to apprehend the reputed father, shall willingly or negligently suffer him to escape; he may be bound over to the sessions, and there indicted, fined, and imprisoned: and under the influence thereof be compelled to make satisfaction to the prosecutors.

The next general quarter sessions] Here is no power to bind the man but to the next sessions, which often happeneth before the child is born: What shall be done with him at such sessions is not very clear; for he is only bound to abide such order as shall then and there be made by the 18 *El.* which supposeth the child to be then born. Perhaps the sessions, upon application of the overseers, may bind him again till the next sessions, especially if the mother shall come to make oath before them; but if the mother be lying in, and cannot come, it is to be considered, whether her examination taken before the first justice, being proved before them, shall be a sufficient ground for them to proceed upon; or whether the first justice, upon the application and examination already made before him, may bind him again to the next sessions. At least, it seemeth, that the justice cannot bind him generally at the first, unto the sessions which shall happen next after the child shall be born; for that such binding is not warranted by the statute.

Elisabeth] This statute recites the name of queen *Elisabeth* with an *s*; whereas the statutes themselves of that queen's reign do always exhibit her name with a *z*. Which is noted here only, as not exactly agreeable to that precision which ordinarily is required in reciting acts of parliament in cases penal.

And if such woman shall die, or be married, before she shall be delivered, or miscarry of such child, or shall appear not to have been with child at the time of her examination, such person shall be discharged from his recognizance at the next sessions, or immediately released

released out of custody by warrant of one justice residing in or near the limits where such parish or place shall lie. §. 2.

And on application made by any such person, who shall be committed to any gaol or house of correction, or by any person on his behalf, to any justice residing in or near the limits where such parish or place shall lie; such justice shall summon the overseers of such parish, or one or more substantial householders of such extraparochial place, to appear before him at a time and place to be mentioned in such summons, to shew cause why such person should not be discharged: And if no order shall appear to have been made, in pursuance of the 18*th of* Elis. *within six weeks after such woman shall have been delivered, such justice may discharge him from his imprisonment.* §. 3.

But it shall not be lawful for any justice, to send for any woman, before she shall be delivered, and one month after, in order to her being examined concerning her pregnancy; or to compel any woman, before she shall be delivered, to answer any questions relating to her pregnancy. §. 4.

To compel any woman] *M.* 11 *G. K.* and *Chandler.* Indictment for secreting a woman big with an illegitimate child, so that she could not be had to give evidence about the father. The defendant demurred. And by the court, Judgment must be given for the defendant, for the child cannot be illegitimate before it is born, there being always a possibility that it may be born in lawful wedlock. And by this act the woman is not to be compelled. *Str.* 612. L. *Raym.* 1368.

III. Order of filiation, and appealing therefrom.

In treating hereof, I will first set forth the statutes, whereon the order is to be framed; then will insert the approved form of an order of bastardy, together with the adjudged cases upon the several parts thereof; and last of all, will consider certain other resolutions upon the said statutes, not relating to the form of such order.

The statutes are these:

By the 18 *El. c.* 3. it is enacted as follows; *Concerning bastards begotten and born out of lawful matrimony, the said bastards being now left to be kept at the charges of the parish where they be born, to the great burden of the same parish, and to the evil example and encouragement of lewd life, it is enacted, that two justices* (1 Q.) *in or next unto the limits where the parish church is, within which parish such bastard shall be born, upon examination of the cause and circumstance* (F), *shall and may by their discretion, take order* (G) *as well for the punishment of the mother and reputed father, as also for the better relief of such parish, in part or in all; and shall and may, by like discretion, take order for the keeping of every such bastard child, by charging such mother or reputed father, with the payment of money weekly, or other sustentation for the relief of such child, in such wise as they shall think meet and convenient: And if after the same order by them subscribed under their hands, the mother or reputed father, upon notice thereof, shall not for their part observe and perform the said order, that then every such party so making de-*

fault

fault in not performing the said order, to be committed to ward to the common gaol, there to remain without bail or mainprise, except he or she shall put in sufficient surety (H) *to perform the said order, or else personally to appear at the next general sessions of the peace, to be holden in that county where such order shall be taken; and also to abide such order, as the said justices, or the more part of them, then and there shall take in that behalf (if they then and there shall take any); and that if at the said sessions, the said justices shall take no other order, then to abide and perform the order before made, as is abovesaid.*

And by 3 *Car. c.* 4. *All justices of the peace within their several limits and precincts, and in their several sessions, may do and execute all things concerning the statute of* 18 El. *that by the justices in their several counties are by the said statute limited to be done.* s. 15.

Upon which statutes, the form of an order of bastardy may be to this effect:

Westmorland. THE *order of* J. P. *and* K. P. *esquires, two of his majesty's justices of the peace in and for the said county, one whereof is of the* quorum, *and both residing* [*in*, or] *next unto the limits of the parish church within the parish of* ——— *in the said county, made the* ——— *day of* ——— *in the* ——— *year* ——— *concerning a (male) bastard child, lately born in the parish of* ——— *aforesaid, of the body of* A. M. *single woman:*

Whereas it hath appeared unto us the said justices, as well upon the complaint of the churchwardens and overseers of the poor of the said parish of ——— *as upon the oath of the said* A. M. *that she the said* A. M. *on the* ——— *day of* ——— *now last past, was delivered of a (male) bastard child at* ——— *in the said parish of* ——— *in the said county, and that the said bastard child is now chargeable to the said parish of* ——— *and likely so to continue; and further, that* A. F. *of* ——— *in the said county, yeoman, did beget the said bastard child on the body of her the said* A. M. *And whereas the said* A. F. *hath appeared before us, in pursuance of our summons for that purpose, but hath not shewed any sufficient cause why he the said* A. F. *shall not be the reputed father of the said bastard child:* [Or, *And whereas it hath been duly proved to us upon oath, that the said* A. F. *hath been duly summoned to appear before us the said justices, to the end we might examine into the cause and circumstance of the premisses; and whereas he the said* A. F. *hath neglected to appear before us, according to such summons:*] *We therefore upon examination of the cause and circumstance of the premisses, as well upon the oath of the said* A. M. *as otherwise, do hereby adjudge him the said* A. F. *to be the reputed father of the said bastard child.*

And thereupon we do order, as well for the better relief of the said parish of ——— *as for the sustentation and relief of the said bastard child, that the said* A. F. *shall and do forthwith, upon notice*

tice of this our order, pay or cauſe to be paid to the ſaid churchwardens and overſeers of the poor of the ſaid pariſh of ——— or to ſome or one of them, the ſum of ——— for and towards the lying-in of the ſaid A. M. *and the maintenance of the ſaid baſtard child, to the time of making this our order.*

And we do alſo hereby further order, that the ſaid A. F. *ſhall likewiſe pay or cauſe to be paid, to the churchwardens and overſeers of the poor of the ſaid pariſh of ——— for the time being, or to ſome or one of them, the ſum of ——— weekly and every week from this preſent time, for and towards the keeping, ſuſtentation, and maintenance of the ſaid baſtard child, for and during ſo long time, as the ſaid baſtard child ſhall be chargeable to the ſaid pariſh of ———.*

And we do further order, that the ſaid A. M. *ſhall alſo pay or cauſe to be paid to the ſaid churchwardens and overſeers of the poor of the ſaid pariſh of ——— for the time being, or to ſome or one of them, the ſum of ——— weekly and every week, ſo long as the ſaid baſtard child ſhall be chargeable to the ſaid pariſh of ——— in caſe ſhe ſhall not nurſe and take care of the ſaid child her ſelf.*

Given under our hands and ſeals the day and year firſt above written.

One whereof is of the quorum] Many orders formerly have been quaſhed, for want of ſetting forth that one of the juſtices was of the *quorum*; but now by the ſtatute of 26 *G.* 2. *c.* 27. no order ſhall be quaſhed for that defect only.

Whereas it hath appeared unto us] *K.* and *Beard.* The examination of the woman muſt be by two juſtices, as well as the ordering part; for the examination is a judicial act, and ought to be by both; and it is not enough that one ſhould examine, and make report to the other; but if they are both preſent, and one only examine, it is well enough, for it is in fact the examination of both. 2 *Salk.* 478.

As well upon the complaint of the churchwardens and overſeers] An order made without the complaint of the pariſh officers, is not good. *Black.* 44.

As upon the oath of the ſaid A. M.] It ſeemeth, that the mother may be examined upon oath, concerning the reputed father, and of the time and other circumſtances; for that in this caſe, the matter, and the trial thereof, dependeth chiefly upon the examination and teſtimony of the mother. *Dalt. c.* 11.

Was delivered of a (male) baſtard child] *H.* 8 *G. K.* and *England.* An order was quaſhed, becauſe the ſex of the baſtard, or the name of it were not mentioned; only, a certain baſtard child born of the body of ſuch a woman. *Strange* 503.

At ——— in the ſaid pariſh of ———] *M.* 11 *An. R.* and *Caſh.* The order did not ſet forth that the child was born in the pariſh; and by the ſtatute the juſtices cannot make an order to compel a man to contribute towards the maintenance of a baſtard child,

child, but in case of that parish where the child was born: And quashed for this reason. *Case of S.* 59.

T. 7 *G. K.* and *Butcher.* Exception was taken to an order of bastardy, that it did not appear the child was born in the parish to which the relief is ordered; for it ran, *We two justices of the borough of* Lime Regis, *residing within the limits where the parish church is, within which parish the child was born* ——— Which is only an averment, that the justices resided in that parish where the child was born, but that might not be the same parish ordered to be relieved. And for this fault the order was quashed. *Strange* 437.

E. 10 *G.* 2. *K.* and *Greaves.* The parish where the child is born, is only to be indemnified; and if the bastard has acquired a settlement elsewhere, the father is then discharged. *Nelf. Bast.*

And upon this head it is observable, that there is one case, which although it frequently happeneth, yet is not within the statute; and that is, where a bastard s born in a parish where the mother hath no settlement. The child shall go with its mother for nurture, whilst it is a nurse child, to her place of settlement; and such place can have no remedy upon this statute, for that the child was not born there. And it seemeth that the parish, where it was born, shall not be liable to maintain it, until the child shall be lawfully removed thither, as to its place of settlement.

Upon which ground also, it seemeth not safe, to grant a certificate with a woman with child of a bastard, thereby indemnifying the parish where it shall be born, and promising to receive and provide for the bastard child when it shall become chargeable. For the parish granting such certificate, can have no remedy against the mother or reputed father, but only the parish where the child was born; nor can that parish neither, because it is indemnified.

Chargeable to the said parish] Order to provide for a bastard child: Exception was taken, that the order doth not set forth that he is chargeable to the parish, or likely to be so. And quashed by the court. *Comb.* 32.

But in *K.* and *Matthews, H.* 8 *W.* Exception was taken, that the order doth not set forth that the child is likely to become chargeable: But this exception was over-ruled; for that it is self evident, that every bastard child is likely to become chargeable. 2 *Salk.* 475, 6.

And further, that A. F. *of* ——— *in the said county, yeoman, did beget the said bastard child*] *T.* 2 *G.* 2. *K.* and *Browne.* Upon an order of bastardy it was stated, that the husband had been absent six years, and that during his absence the defendant had *had carnal knowledge* of the wife, and therefore they adjudge him to be the putative father. But by the court, This order must be quashed; for his lying with her is not a sufficient reason to infer him the father of this child: and though the justices need not shew the grounds they go upon, yet if they do, and it appears no sufficient ground, their order will be bad. *Strange* 811.

Sum-

Summons] If the order do not set forth, that the defendant was duly summoned to appear, and for what cause, it ought to be quashed. *K.* and *Glegg*, *Cases in L. and E.* 4.

T. 6 & 7 *G.* 2. *K.* and *Cotton.* Motion for an information against the defendant, who with another justice made an order of bastardy upon one *Fitzgerald*, without summoning him to appear before them to make his defence: Upon appeal to the sessions he was acquitted, and put to great expences; which it was insisted was contrary to natural justice. By Mr. Justice *Page*: No man in an office can be supposed to be so ignorant, as not to know it is against natural justice, to convict a man without a summons; the examination ought to be so made, that the truth may appear, and that must be by examining both sides, otherwise it is partial; the scandal, the expence, and the disorder in Mr. *Fitzgerald*'s family, are things that ought to be considered; here was no taking by warrant, and therefore an action of false imprisonment would not lie; and this is the only method can be used, to punish the justice. Mr. J. *Probyn*; The principal objection about a summons is right in law, and in reason; possibly an action on the case might be framed; there may possibly have been only an error in judgment, and it is hard to grant an information. Mr. J. *Lee*; If this was strictly a conviction, against which no appeal lies, an information ought to be granted; but he thought the matter was not so very strong in the case of orders. And the rule was discharged. *Sess. C. V.* 1. 179.

E. 8 *G.* 2. *K.* v. *Taylor* and *Neale.* Motion in the king's bench for an information against the defendants, two justices of *Devonshire*, for making an order on one *Nicholas Mould*, adjudging him to be the putative father of a bastard child, without summoning him, and also for refusing to hear his witnesses. On shewing cause, it appeared that he was summoned by a third justice, which the court held to be sufficient; but that the defendant not appearing himself, the justices would not hear his witnesses. And by the court, supposing the man was summoned, and did not appear, the justices are not then bound to hear any evidence for him; and this court will not hear any evidence in behalf of a person, who should attend here, and does not. *Sess. C. V.* 2. 192.

Do hereby adjudge] *T.* 4 *An.* *Q.* and *Weston.* The great objection which stuck long with the court, was, that it was said in the order, we the said justices *doth* adjudge, instead of *do* adjudge; and after the case had depended two terms, and been several times stirred, the court for that exception, the last day of the term, quashed the order. L. *Raym.* 1198.

And afterwards, *H.* 4 *An.* The same justices made another order, with the very same fault in it, *viz.* *doth* adjudge; and upon a *certiorari*, that was quashed. L. *Raym.* 1198.

Adjudge the said A. F. *to be the reputed father*] *E.* 20 *C.* 2. *K.* and *Perkasse.* An order was quashed, because there was no adjudication, that the person against whom the complaint was made, was the reputed father. 2 *Sid.* 363.

H. 9 *G.* 2. *K.* and *Jenkins.* Motion to quaſh an order of two juſtices, whereby they adjudge, that ſuch a perſon is *not* the putative father of a baſtard child, and therefore they diſcharge him; and the rather, becauſe in ſuch a caſe the pariſh cannot appeal, becauſe an appeal is only, when the party refuſes to give ſecurity to come to ſeſſions. And by the whole court, the two juſtices have no ſuch authority; for their whole power depends on the ſtatute of 18 *El.* and that is only to take order for puniſhment of the parties, and for relief of the pariſh; and this order is for neither the one nor the other. *Seſſ. C. V.* 2. 161. *Strange* 1050.

The ſum of ——— *for and towards the lying-in*] *M.* 12 *An. Q.* and *Odam.* Order for maintenance of a baſtard child, was excepted to, becauſe the defendant is upon ſight of the order to pay 9 *l.* in groſs; and after that, ſo much weekly. And by the court; By the ſtatute the juſtices are to take order for relief of the pariſh, and keeping of the child, by payment of money weekly, or other ſuſtentation; and this may be only indemnifying the pariſh for money laid out before the reputed father was found. 1 *Salk.* 124.

The ſum of ——— *weekly*] *E.* 20 *C.* 2. *K.* and *Perkaſſe.* It was moved in the court of king's bench, to quaſh an order for maintaining a baſtard child made at the quarter ſeſſions, and the exception was, becauſe it was unreaſonable, in reſpect of the ſmallneſs of the ſum; namely, but 2 *d.* a week for the maintenance of the child: And the court were of opinion that it ſhould be quaſhed, unleſs cauſe ſhewn; and they ſaid, that altho' none but the juſtices could declare the father, yet if they were unreaſonable in the ſum, the court might judge of that. 2 *Sid.* 363.

During ſo long time as the ſaid baſtard child ſhall be chargeable] *E.* 9 *W. K.* and *Barebaker*, Order to pay ſo much money by the week, till the child ſhall be fourteen years of age, is naught; for the juſtices have no power but to indemnify the pariſh; and that is only to oblige him to maintain the child, as long as it is or may be chargeable. 1 *Salk.* 121. 2 *Salk.* 478.

An order that the putative father ſhould pay ſo much a week, until it ſhould be able to get its living by working, was quaſhed; it ſhould have been for ſo long time, as the child ſhall be chargeable to the pariſh. 1 *Vent.* 210.

M. 1 *G.* 2. *K.* and *Street.* An order of baſtardy was made, to pay ſo much weekly, till the child was nine years old, if it ſhould ſo long live. And by the court, It is a good order, for we cannot intend it able to provide for it ſelf ſooner. *Strange* 788. But then it may be bound an apprentice into another pariſh before that age, and having gained a ſettlement in ſuch other pariſh, the effect of the order ſhould then ceaſe. Therefore it is beſt in this and all ſuch like caſes to hold to the ſtatute: and the ſtatute here only gives power to the juſtices *to take order for the relief of the pariſh where the child ſhall be born.*

T. 9 *W. Browne*'s caſe. The juſtices cannot order a ſum, for putting out the child an apprentice. *Comb.* 448.

But in the caſe of *K.* and *Blackwell*, *M.* 4 *G.* The order was, that the reputed father ſhall pay to the churchwardens ſo much

weekly from the time of the birth of the child, until he ſhall attain the age of 12 years, if he ſhall ſo long continue chargeable; and when he ſhall attain the age of 12 years, to pay 4 *l.* to put him out apprentice, and this was held good. The ſame reſolved, *Caſes in L. and E.* 85. And *H.* 2 *G. K.* and *Stone. Nelſ. Baſt.*

But it ſeemeth not neceſſary to incumber the order therewith; for it may be the ſame thing if the pariſh bind him out, and pay the money; for until ſuch ſum ſhall be run off by the weekly payments, ſo long the child continues chargeable.

But after all, ſo far as theſe errors above rehearſed ſhall affect only the form of the order, and not the merits thereof; the ſame may be amended at the ſeſſions, by the 5 *G.* 2. *c.* 19. before the appeal ſhall be proceeded upon, and then the court ſhall go upon the merits.

HAVING thus diſtinctly conſidered the form of an order of baſtardy as eſtabliſhed upon the ſtatutes aforegoing, I proceed to ſome other reſolutions upon the ſaid ſtatutes, concerning divers matters not relating to the form of ſuch order: Which are theſe. 1. In what time the order ſhall be made. 2. Whether the juſtices can order ſecurity to be given to perform their order. 3. To what ſeſſions the appeal againſt the order ſhall be. 4. Whether the ſeſſions can proceed originally in the caſe of baſtardy. 5. Whether on appeal it is neceſſary that the reputed father ſhall be preſent in court. 6. In what caſe the order of the ſeſſions ſhall be final. 7. In what manner the ſeſſions ſhall inforce their own order. 8. What ſhall be done if the two next juſtices cannot agree. 9. What ſecurity ſhall be requiſite to indemnify the pariſh, to prevent any order from being made.

(1) *In what time the order ſhall be made.* There is no time limited by the ſtatute, in which the order ſhall be made; ſo that it may be made at any time after the birth of the child.

And in the caſe of *K.* and *Miles, M.* 1 *G.* On motion to quaſh an order of baſtardy, it was reſolved, that if the father run away, and return, tho' 14 years after, yet an order to fix the child on him is good; for there is no ſtatute of limitation in theſe caſes. *Seſſ. C. V.* 1. 77.

But by the aforeſaid ſtatute of 6 *G.* 2. if the reputed father is in priſon, and no order ſhall be made in ſix weeks after the birth of the child, he may in ſuch caſe be diſcharged from his impriſonment; but the order nevertheleſs made upon him afterwards, will be good.

(2) *Whether the juſtices can order ſecurity to be given to perform their order. E.* 2 *An. Q.* and *Chaffey.* Exception was taken, that the order was, that the defendant ſhould give ſecurity for payment of the ſum by them impoſed for the maintenance of the child; when it did not appear, that the defendant had diſobeyed the order in point of payment. And for this reaſon, the order was quaſhed as to that part. L. *Raym.* 858. 3 *Salk.* 66.

And with this all the other reſolutions do agree. *T.* 11 *An. Q.* and *Clogg.* 4 *G. K.* and *Buckle. T.* 8 & 9 *G.* 2. *K.* and *Meſſenger. Nelſ. Baſt.*

And so are the words of the statute; *viz. if the party shall not perform the said order*, he shall then (so making default) be committed, unless he shall put in surety to perform the same, or to appear at the sessions.

And therefore that part of the form of an order, which directeth such security to be given, and which runs thro' almost all the books, seems to be not good.

And here then will be a gap left open, by a defect in the law, for the reputed father to run away, and (if he leave no effects) to avoid the future payments, by obeying the order for the present, in paying off so far as shall be then due; for here seemeth to be no power to compel security to be given for the future, unless only in the case of disobedience.

(3) *To what sessions the appeal against the order shall be.* The statute directs, that the appeal shall be *to the next general sessions of the peace to be holden in that county, where such order shall be taken.*

Next general sessions] That is to say, The next general sessions after notice of such order. 3 *Keb.* 551.

General sessions] *T.* 10 *W. K.* and *Shaw.* An order was made by two justices, adjudging *Shaw* to be the reputed father of a bastard; whereupon he appealed to the next *quarter* sessions after notice; where the order of the two justices was discharged: And now it was moved to quash the order of sessions, because by the statute the appeal must be to the next *general* sessions, and there might have been a general sessions before the general quarter sessions, as in *London* and *Middlesex*, where there are four general sessions in the year, besides the quarter sessions. And quashed for this fault. 2 *Salk.* 482.

To be holden in that county] It was moved to quash an order, for that it was at the sessions of the peace *in* the county aforesaid, and did not say *for* the county; but this was overruled, for that there is not so much strictness required in orders, as there is in indictments. 1 *Ventr.* 37.

To which may be added also, that this is according to the words of the statute.

In that county where such order shall be taken] *T.* 15 *C.* 2. *K.* and *Coystan.* Resolved, that this shall be intended of the next sessions of that part of the county, where it was made, and not at the next sessions in the county at large; for that would be mischievous in many counties, where there are several sessions in distinct parts of the county. 1 *Sid.* 149.

(4) *Whether the sessions can proceed originally in the case of bastardy.* It hath been much disputed, whether the sessions may make an original order, in the case of bastardy, by the statute of the 3 *Car. c.* 4. in like manner as the two justices may do by the 18 *El.* If a conjecture may be allowed, after so long a space of time from the making of the said acts, and after the opinions of so many learned men thereupon, it should be this: In the first place, as to those who hold the negative, namely, that the sessions

ſions cannot proceed originally upon the ſaid ſtatute of 3 *Car.* it is clearly obſervable, albeit their opinion may be true, that it reſteth upon a falſe foundation, namely, upon a ſuppoſition that the ſaid ſtatute of 3 *Car.* is expired; which is none other than a palpable overſight committed by one author, and followed by others without examination (a thing not unuſual in this kind of learning). Suppoſing therefore that the ſtatute of the 3 *Car.* is of force, let us put the caſe, that the ſeſſions may proceed originally thereupon, in like manner as the two juſtices may do by the 18 *El.* then there will appear this difficulty upon the face of it, that after the ſeſſions ſhall have made ſuch order, if the party ſhall make default in the performance thereof, then (according to the directions of the ſaid ſtatute of 18 *El.*) the party ſo making default ſhall put in ſurety to perform the ſaid order, or elſe perſonally to appear at the next ſeſſions, to abide ſuch order as ſhall there be made in the premiſſes, or ſhall be committed for his refuſal. Which implies an appeal from one ſeſſions to another; a thing which is unknown to our laws, an appeal always ſuppoſing a removing the cauſe from an inferior to an higher juriſdiction, and not from the ſame court to the ſame court. Now the obvious reſolution of the matter perhaps may be this; the ſtatute of the 18 *El.* which was a temporary act, doth require, that if the party ſhall make default in performance of the order of the two juſtices, they ſhall commit him to gaol, unleſs he ſhall put in ſurety to perform the ſaid order, or elſe perſonally to appear at the next ſeſſions, and to *abide ſuch order as the juſtices there ſhall take in that behalf (if they then and there ſhall take any) and that if at the ſaid ſeſſions they ſhall take no other order, then to perform the ſaid order before made*; without any ſpecial power given to the ſeſſions, either by that act, or by any other, to take any order therein at all. Then comes the ſtatute of 3 *Car. c.* 4. which enacteth, that the ſaid ſtatute of 18 *El.* ſhall be continued, together with this ſupplementary clauſe, that *the juſtices in ſeſſions may do and execute all things concerning the ſaid ſtatute of* 18 El. *that by the juſtices in the ſeveral counties are by the ſaid ſtatute limited to be done.* And then the whole taken together will amount to no more than this; that the two juſtices out of ſeſſions ſhall take order for the puniſhment of the mother and reputed father, and for the relief of the pariſh, and that if upon appeal the matter ſhall come before the ſeſſions, the ſeſſions ſhall have power to determine thereupon, and to take ſuch order therein, as the two juſtices may do out of ſeſſions.

So that upon this ſuppoſition, the ſtatute of the 3 *Car.* doth not give the ſeſſions a power to proceed originally, and ſo deprive the party of the benefit of an appeal, but only explains the power intended by the 18 *El.* of the ſeſſions upon an appeal to hear and determine the ſame

And nothing is more frequent, in the like caſes, than for an act continuing a former act, to add an explanatory clauſe of ſome doubtful part of ſuch former act; of which we have an inſtance at hand in this very ſame ſtatute of 3 *Car. c.* 4. which, continuing the ſtatute of the 43 *El.* concerning the power given to the overſeers to bind out poor children apprentices, adds this ex-

planatory clauſe, *viz.* that all perſons to whom the overſeers ſhall bind ſuch poor children apprentices, may take and receive them as apprentices.

(5) *Whether on appeal it is neceſſary that the reputed father ſhall be preſent in court. H.* 8 *W. K.* and *Matthews.* The court will not quaſh an order of baſtardy, unleſs the reputed father be preſent in court. 2 *Salk.* 475.

And the reaſon is, that if the cauſe ſhall go againſt him, he may be proceeded againſt, in caſe of contempt or diſobedience.

(6) *In what caſe the order of the ſeſſions ſhall be final. M.* 13 *G. K.* and *Tenant.* The order of two juſtices being quaſhed upon the merits by the ſeſſions on an appeal, the defendant is thereby legally acquitted, and cannot be drawn in queſtion again for the ſame fact. L. *Raym.* 1423, 4. *Strange* 716.

If the two next juſtices make an order, and the party appeals to the next ſeſſions, and they alter, or diſcharge, or confirm that order, any other ſeſſions cannot order any thing contrary thereto, for the order upon the appeal is final. *Cro. Car.* 341, 350. *Pridgeon*'s caſe.

T. 1 *G.* 2. *K.* and *Arundell.* Two juſtices make an order, that the defendant ſhall pay a ſum in groſs, and alſo 2*s.* a week ſo long as the child ſhall be chargeable. The party appeals to the ſeſſions, who confirm the order. At a ſubſequent ſeſſions, the father of the baſtard deſired to have the keeping of it, and that the payment of the 2*s.* a week ſhould ceaſe; which the ſecond ſeſſions ordered. Motion was made to quaſh this laſt order of ſeſſions, becauſe in this caſe they had no juriſdiction. And the court held, that the ſecond ſeſſions had no authority to order the ſubtraction of the 2*s.* a week; and the order was quaſhed, becauſe it was made out of time (being three years after the appeal), and therefore the juſtices had no juriſdiction. *Seſſ. C. V.* 1. 234.

(7) *In what manner the ſeſſions ſhall inforce their own order. T.* 4 *An. Q.* and *Weſton.* The caſe was, *Weſton* had appealed to the ſeſſions, where the order was confirmed, and he committed for not paying the money ordered: And exception was taken, that the ſeſſions ſhould have proceeded againſt him upon his recognizance. And by *Holt* Ch. J. If they proceed on the 18 *El.* the ſeſſions hath no power to commit, but to proceed on his recognizance; but if on the 3 *C.* the ſeſſions may commit as the two juſtices might have done, that is, unleſs the party put in ſecurity to perform the order, or to appear at the next ſeſſions. 1 *Salk.* 122. L. *Raym.* 1157.

Note; This caſe goes upon the ſuppoſition that the ſeſſions may proceed originally on the ſtatute of 3 *C. c.* 4. and thereupon inferreth the abſurdity abovementioned, of appealing from one ſeſſions to another. But the method of proceeding againſt the reputed father, in caſe of diſobedience to the order of ſeſſions, ſeemeth to be not difficult; if he is bound over to abide the order of the ſeſſions, his recognizance may be eſtreated; if he hath not been bound over, he may be indicted, fined, and impriſoned for the contempt.

(8) *What*

(8) *What ſhall be done if the two next juſtices cannot agree.* In this matter the ſtatute of 18 *El.* is different from moſt other ſtatutes; for generally where power is given to two j ſtices, the ſtatutes expreſs that two or more juſtices may do ſuch a thing; but here the ſtatute ſaith only, that two juſtices, dwelling in or next unto the pariſh, ſhall have power to take order therein. And Mr. *Dalton* makes a *quære*, what ſhall be done, if the two next juſtices cannot agree in the order, or ſhall make no order: And this caſe, tho' likely enough to happen ſometimes, hath not yet been determined. If they will not proceed at all, there ſeemeth to be no doubt, but that they may be compelled by a *mandamus*; and if they cannot agree, yet ſtill it ſeemeth, that they may in like manner be compelled, for till that is done, they have taken no order for the relief of the pariſh, which the ſtatute requires that they ſhall do. But whether, if one of the next juſtices ſhall refuſe, and another not the next ſhall or may act in ſuch caſe, doth not appear to have been adjudged.

(9) *What ſecurity ſhall be requiſite to indemnify the pariſh, to prevent any order from being made. E.* 11 *An.* 2. and *Smith.* If the father will take the child (and the mother is willing to part with it, being a nurſe child) he muſt do it at firſt; and by ſuffering the order to be made, it ſhall be deemed a refuſal in law: beſides, he ſhall not then be ſuffered; he may ſell it, or make away with it, as too often happens. *Caſ. of S.* 64.

Whether a bond or other ſecurity ought to be made to the churchwardens and overſeers and their ſucceſſors, or to their executors or adminiſtrators, hath been queſtioned; concerning which, the author of the readings upon the ſtatutes ſaith thus: Thoſe gentlemen who have taken upon them, to direct the officers, to have ſuch bonds or other ſecurities made to them and their ſucceſſors, would do well to conſider, whether the churchwardens and overſeers are ſuch a corporation as can purchaſe, ſue and be ſued. And whether bonds, being things in action, it may not be difficult for the ſucceſſors of the churchwardens and overſeers, to whom they were made, to maintain an action, on a bond made to their predeceſſors. 'Tis true, churchwardens may maintain an action for the goods of their church. But they are not ſuch a corporation, as can take or purchaſe lands, or take ſecurities for the uſe of their church, except in *London.* And it never was pretended, that the churchwardens and overſeers of the poor are a corporation in any reſpect, in relation to the poor, and conſequently, can neither ſue nor be ſued as ſuch. *Read. Baſt.*

And indeed, upon the whole, the taking of a bond in any kind ſeemeth not ſo convenient for the pariſh, as an order made by the juſtices; becauſe the ſuing upon a bond is both tedious and expenſive, whereas the courſe of carrying of an order into execution is very ſhort and eaſy. But then, on the other hand, a bond will bind a man's executors; but the order of the juſtices being obligatory only upon the man himſelf, when he dies, the order dieth with him.

IV. Punishment of the mother and reputed father.

By the 18 *El. c.* 3. *Concerning bastards being left to be kept at the charges of the parish where born, to the great burden thereof, and to the evil example and encouragement of lewd life, it is enacted, that the two next justices shall take order therein, as well for the punishment of the mother and reputed father, as for the relief of the parish.*

And by 7 *J. c.* 4. *Every lewd woman which shall have any bastard which may be chargeable to the parish, the justices of the peace shall commit such lewd woman to the house of correction, there to be punished and set on work, during the term of one whole year; and if she shall afterwards offend again, then to be committed to the said house of correction as aforesaid, and there to remain, until she can put in good sureties for her good behaviour, not to offend so again.* §. 7.

For the punishment of the mother and reputed father] That is, by corporal punishment: But a woman shall not be punished both by corporal punishment, and by being sent to the house of correction, for that no one ought to be punished twice for one and the same offence. *Dalt. c.* 11.

Bastard which may be chargeable] It seemeth by these words, that such a woman shall not be sent to the house of correction, until after the child be born, and that it be living; for it must be such a child as may be chargeable to the parish. *Dalt. c.* 11.

And if she will discharge the parish of keeping the bastard, she cannot be punished by this statute of 7 *J.*

But nevertheless she may be punished (Lord *Coke* says) by the statute of 18 *El.* 2 *Inst.* 733.

Which opinion seems justly questionable: for the preamble of the said act of 18 *El.* (as hath been rehearsed) seemeth to restrain the jurisdiction of the justices to the parents of such bastard children only as may be chargeable.

But the proper punishment in such case, seems to be by presentment in the spiritual court.

The justices of the peace shall commit] It seemeth that such commitment ought to be by two justices at the least; and by comparing the two statutes together, it seemeth fittest for the two next justices authorized by the 18 *El.* *Dalt. c.* 11.

Shall commit such lewd woman] But such punishment shall not be, until after that the woman is delivered of her child; neither are the justices to meddle with the woman, until the child be born, and she strong again. *Dalt. c.* 11.

Also it seemeth, that such bastard child is not to be sent with the mother to the house of correction, but rather that the child should remain in the town where it was born (or settled with the mother) and there to be relieved by the work of the mother, or by relief from the reputed father; and yet the common opinion and practice is otherwise, *viz.* to send the child with the mother

to

to the house of correction; and this may also seem reasonable, where the child sucketh on the mother. *Dalt. c.* 11.

But it seemeth much the best, to commit the mother only, and not the child, but leave it to her choice whether she will take it with her; and if she will not, then to send it to its lawful place of settlement.

Then to be committed to the said house of correction as aforesaid] Which words do imply that she shall not be punished as for a second offence, unless she hath been committed and punished in the house of correction for the first.

V. Mother or reputed father running away.

Whereas the putative fathers and lewd mothers of bastard children run away out of the parish and sometimes out of the county, and leave the bastard children upon the charge of the parish where they are born, altho' they have estates sufficient to discharge the parish; it shall be lawful for the churchwardens and overseers of such parish where any bastard child shall be born, to take and seize so much of the goods, and receive so much of the annual rents of the lands of such putative father or lewd mother, as shall be ordered by any two justices, towards the discharge of the parish, to be confirmed at the sessions, for the bringing up and providing for such bastard child; and thereupon the sessions may make an order for the churchwardens or overseers of such parish, to dispose of the goods by sale or otherwise, or so much of them for the purposes aforesaid, as the court shall think fit, and to receive the rents and profits of the lands, or so much of them as shall be so ordered by the sessions. 13 & 14 C. 2. c. 12. s. 19.

E. 2 *An. Q.* and *Chaffey.* Order to the churchwardens and overseers, to seize of the putative father's goods, what they should judge proper for securing of the parish, quashed; for that it should be, what the justices think proper, and not what the churchwardens and overseers think proper. L. *Raym.* 858.

VI. Murdering a bastard child.

Concealing the death of a bastard child.

1. By the 21 *J. c.* 27. *If any woman be delivered of any issue of her body, male or female, which being born alive, should by the laws of this realm be a bastard, and she endeavour privately, either by drowning, or secret burying thereof, or any other ways, either by her self, or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed, she shall suffer death as in case of murder, except she can prove by one witness at the least, that the child was born dead.*

And it hath been adjudged, that in order to convict a woman by force of this statute, there is no need that the indictment be drawn specially, or conclude against the form of the statute; for the statute doth not make a new offence, but only make such concealment an undeniable evidence of murder. 2 *Haw.* 438.

Also,

Also, it hath been agreed, that where a woman appears to have endeavoured to conceal the death of such child within the statute, there is no need of any proof that the child was born alive, or that there were any signs of hurt upon the body, but it shall be undeniably taken that the child was born alive, and murdered by the mother. 2 *Haw.* 438.

But it hath been adjudged, that where a woman lay in a chamber by her self, and went to bed without pain, and waked in the night, and knocked for help but could get none, and was delivered of a child, and put it in a trunk, and did not discover it till the following night, yet she was not within the statute, because she knocked for help. 2 *Haw.* 438.

Also, it hath been agreed, that if a woman confess her self with child beforehand, and afterwards be surprized and delivered, no body being with her, she is not within the statute, because there was no intent of concealment, and therefore in such cases it must appear by signs of hurt upon the body, or some other way, that the child was born alive. 2 *Haw.* 438.

Giving a potion to cause abortion.

2. If a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly that it kills her, this is murder; for it was not given to cure her of a disease, but unlawfully to destroy her child within her; and therefore he that gives her a potion to this end, must take the hazard, and if it kills the mother, it is murder. 1 *H. H.* 429, 30.

If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, tho' it be a great crime, yet it is not murder nor manslaughter by the law of *England*, because it is not yet *in rerum natura*, nor can it legally be known, whether it were killed or not: So it is, if after such child were born alive, and after die of the stroke given to the mother, this is not homicide. 1 *H. H.* 433.

But if a man procure a woman with child to destroy her infant when born, and the child is born, and the woman in pursuance of that procurement kill the infant; this is murder in the mother, and the procurer is accessary. 1 *H. H.* 433.

VII. Capacity of a bastard child as to inheritance.

A bastard can have no name of reputation as soon as he is born; but after he is born, and hath gained by time a name by reputation, he may purchase by his reputed name, to him and to his heirs; tho' he can have no heirs but of his body. 1 *Inst.* 3. 6 *Co.* 65.

A bastard is *terminus a quo*; he is the first of his family, for he hath no relation of which the law takes any notice; but this must be understood as to civil purposes, for there is a relation as to moral purposes, therefore he cannot marry his own mother, or sister, or the like. 3 *Salk.* 66.

A. Volun-

A. Voluntary examination of a woman with child of a baſtard; by 6 *G.* 2. *c.* 31.

Weſtmorland. THE *voluntary examination of* A. M. *of* —— *in the ſaid county, ſinglewoman, taken on oath, before me* —— *one of his majeſty's juſtices of the peace in and for the ſaid county, this* —— *day of* ——.

Who ſaith, that ſhe is now with child, and that the ſaid child is likely to be born a baſtard, and to be chargeable to the pariſh of —— *in the ſaid county, and that* A. F. *of* —— *in the ſaid county, weaver, is the father of the ſaid child.*

The mark of
Taken and ſigned the day and year † A. M.
abovewritten, before me
J. P.

Note; Theſe ſame forms will ſerve, with a very little variation, *after* the birth of the child.

B. Warrant for apprehending the reputed father, before the birth; on 6 *G.* 2. *c.* 31.

Weſtmorland. { To the conſtable of ——.

WHEREAS A. M. *of* —— *in the ſaid county, ſinglewoman, hath by her voluntary examination taken in writing upon oath, before me* —— *one of his majeſty's juſtices of the peace in and for the ſaid county, this preſent day declared herſelf to be with child, and that the ſaid child is likely to be born a baſtard, and to be chargeable to the pariſh of* —— *in the ſaid county, and that* A. F. *of* —— *in the ſaid county, weaver, is the father of the ſaid child; And whereas* O. P. *one of the overſeers of the poor of the pariſh of* —— *aforeſaid, in order to indemnify the ſaid pariſh in the premiſes, hath applied to me to iſſue my warrant for the apprehending of the ſaid* A. F. *I do therefore hereby command you, immediately to apprehend the ſaid* A. F. *and to bring him before me or ſome other of his majeſty's juſtices of the peace for the ſaid county, to find ſecurity to indemnify the ſaid pariſh of* —— *or elſe to find ſufficient ſurety for his appearance at the next general quarter ſeſſions* [or, *next general ſeſſions*] *of the peace to be holden for the ſaid county, then and there to abide and perform ſuch order or orders as ſhall be made, in purſuance of an act paſſed in the eighteenth year of the reign of her late majeſty queen* Elizabeth, *concerning baſtards begotten and born out of lawful matrimony. Given under my hand and ſeal, the* —— *day of* &c.

C. Commitment thereupon; by the 6 *G.* 2. *c.* 31.

Weſtmorland. { To the conſtable of ——— in the ſaid county, and to the keeper of the houſe of correction [*or*, common gaol] at ——— in the ſaid county.

WHEREAS A. M. *of* ——— *ſingle woman, in her voluntary examination taken in writing and upon oath, the* ——— *day of* ——— *now laſt paſt, before me* ——— *one of his majeſty's juſtices of the peace in and for the ſaid county, hath declared herſelf to be with child, and that the ſaid child is likely to be born a baſtard, and to be chargeable to the ſaid pariſh of* ——— *and hath charged* A. F. *of* ——— *gentleman, with having gotten her with child of the ſaid child; And whereas the ſaid* A. F. *being now perſonally preſent before me, being brought by my warrant, upon application for that purpoſe to me made, by* O. P. *one of the overſeers of the poor of the ſaid pariſh, hath refuſed to give ſecurity to indemnify the ſaid pariſh, and hath alſo refuſed to enter into a recognizance with ſufficient ſurety, upon condition to appear at the next general quarter ſeſſions* [or, *next general ſeſſions*] *of the peace to be holden for the ſaid county, and to abide and perform ſuch order or orders as ſhall be made in purſuance of an act paſſed in the eighteenth year of the reign of her late majeſty queen* Elizabeth, *concerning baſtards begotten and born out of lawful matrimony: Theſe are therefore to command you the ſaid conſtable, to take and convey the ſaid* A. F. *to the houſe of correction at* ——— *in the ſaid county, and to deliver him to the keeper thereof, together with this warrant. And I do hereby command you the ſaid keeper of the ſaid houſe of correction, to receive the ſaid* A. F. *into your cuſtody in the ſaid houſe of correction, and him there ſafely to keep, until he ſhall give ſuch ſecurity, or enter into ſuch recognizance as aforeſaid, or be otherwiſe lawfully delivered from thence. Given under my hand and ſeal the* ——— *day of* &c.

D. Bond to indemnify the pariſh.

KNOW *all men by theſe preſents, that we* A. F. *of* ——— *in the county of* ——— *gentleman, and* A. S. *of* ——— *yeoman, are held and firmly bound unto* ——— *churchwardens, and* ——— *overſeers of the poor of the pariſh of* ——— *in the ſaid county (in truſt for the pariſhioners of the ſaid pariſh) in* ——— *pounds of good and lawful money of* Great Britain, *to be paid to the ſaid* ——— *or their certain attorney, their executors, adminiſtrators, or aſſigns: To which payment well and truly to be made, we bind our ſelves, and each of us, jointly and ſeverally, and our and each and every of our heirs, executors, and adminiſtrators, firmly by theſe preſents; Sealed with our ſeals, and dated the* ——— *day of* ——— *in the* ——— *year of the reign of our ſovereign lord* George

the

the second, of Great Britain, France, *and* Ireland, *king, defender of the faith, and so forth, and in the year of our lord* ———.

The condition of this obligation is such, that whereas A. M. *of* ——— *singlewoman, hath in and by her voluntary examination, taken in writing and upon oath, before* ——— *one of his majesty's justices of the peace in and for the said county of* ——— *declared that she is with child, and that the said child is likely to be born a bastard, and to be chargeable to the said parish of* ——— *and that the abovebounden* A. F. *is the father of the said child; If therefore the said* A. F. *and* A. S. *or either of them, their or either of their heirs, executors, or administrators, do and shall from time to time, and at all times hereafter, fully and clearly indemnify and save harmless, as well the above named churchwardens and overseers of the poor of the said parish of* ——— *and their successors for the time being, as also all and singular the other parishioners and inhabitants of the said parish of* ——— *which now are, or hereafter shall be for the time being, of and from all manner of costs, taxes, rates, assessments, and charges whatsoever, for or by reason of the birth, education, and maintenance of the said child, and of and from all actions, suits, troubles and other charges and demands whatsoever, touching or concerning the same, that then this present obligation to be void, otherwise of force.*

Signed, sealed, and delivered (having been first duly stamped) in the presence of	A. F. A. S.

E. Condition of a recognizance for the father to appear at sessions; on 6 *G.* 2. *c.* 31.

THE *condition of this recognizance is such, that if the said* A. F. *do and shall appear at the next general quarter sessions* [or, *the next general sessions*] *of the peace to be holden for the said county, and shall then and there abide and perform such order or orders as shall be made in pursuance of an act passed in the eighteenth year of the reign of her late majesty queen* Elizabeth, *concerning bastards begotten and born out of lawful matrimony, upon the complaint of the churchwardens and overseers of the poor of the parish of* ——— *in the said county, for begetting a child on the body of* A. M. *singlewoman, which child is likely to be born a bastard, and to be chargeable to the said parish of* ——— *Then this recognizance to be void, otherwise of force.*

If it is after the birth, then say, For begetting a bastard child, born in the parish of ——— *in the said county, on the body of* A. M. *singlewoman, which child is now chargeable* [or, *likely to be chargeable*] *to the said parish of* ——— *Then this recognizance to be void.*

F. Warrant

F. Warrant of the two next justices, for the mother, with a summons for the reputed father, to make the order of filiation and maintenance; on the 18 *El. c.* 3.

Westmorland. { To the constable of ———.

WHEREAS *information hath been made unto us* ——— *two of his majesty's justices of the peace in and for the said county, one whereof is of the* Quorum, *and both of us residing next unto the limits of the parish church within the parish of* ——— *in the said county, as well upon the complaint of the churchwardens and overseers of the poor of the said parish, as on the oath of* A. M. *of* ——— *singlewoman, that on the* ——— *day of* ——— *last past, she the said* A. M. *was delivered of a (male) bastard child at* ——— *in the said parish, and that* A. F. *of* ——— *in the said county, taylor, is the father of the said bastard child, and that the said bastard child is now living, and chargeable* [or, *likely to be chargeable*] *to the said parish of* ——— *These are therefore to command you to bring the said* A. M. *before us, at the house of* ——— *in* ——— *in the said county, on* ——— *the* ——— *day of* ——— *at the hour of* ——— *in the afternoon of the same day, to be by us further examined, touching the premisses; And that you give notice thereof, unto the said* A. F. *that he may likewise be at the time and place aforesaid, to make his lawful defence: To the end that upon the examination of the cause and circumstance, we may take such order therein, as to right doth appertain. And what you shall do in the execution hereof, you are to make known unto us at the time and place aforesaid. Given under our hands and seals the* ——— *day of* &c.

G. Order of filiation and maintenance, for the reasons there specified, is inserted in the body of the title aforegoing.

H. Condition of a recognizance to appear at the sessions, after the order not performed; on 18 *El. c.* 3.

WHEREAS *by an order under the hands and seals of us* ——— *two of his majesty's justices of the peace for the said county, one whereof is of the* Quorum, *and both of us residing* [*in*, or] *next unto the limits of the parish church within the parish of* ——— *in the said county,* A. F. *of* ——— *in the said county, taylor, is adjudged to be the reputed father of a bastard child born lately of the body of* A. M. *of* ——— *singlewoman, at* ——— *in the*

the ſaid pariſh of ——— [*And then ſet forth what was ordered therein further*] *And whereas the ſaid* A. F. *hath not obſerved nor performed the ſaid order*;

The condition therefore of this recognizance is ſuch, that if the abovebound A. F. *ſhall obſerve and perform the ſaid order, or ſhall perſonally appear at the next general ſeſſions of the peace, to be holden in and for the ſaid county, and ſhall then and there abide ſuch order as ſhall be then made by the court, concerning the ſaid baſtard child, if any ſuch order ſhall be then made; and if no ſuch order ſhall be then made or taken by the ſaid court, if the ſaid* A. F. *do and ſhall perform the order already by us made as aforeſaid: Then this recognizance to be void.*

Battery. See Aſſault.
Bawdy houſes. See Lewdneſs.
Beer. See Exciſe.
Behaviour. See Surety.

Bent.

WHEREAS on the north weſt coaſts of *England*, and eſpecially in the county of *Lancaſter*, the ſea is bounded, and the lands are prevented from being overflowed, by large hills, the ſand of which is ſo looſe, that in dry weather it is thrown by the winds on the adjacent lands, to the damage thereof, and the danger of the inhabitants, who are expoſed thereby to the inundation of the ſea; to prevent which, the land owners are at great charges annually to plant and maintain a ſort of ruſh or ſhrub called *ſtarr* or *bent*; but many diſorderly perſons pluck up and carry away the ſame, to make matts and bruſhes: Therefore if any perſon, without conſent of the owner, ſhall cut, pull up, or carry away any ſtarr or bent off the ſaid hills on the north weſt coaſts of *England*, on complaint thereof on oath to one juſtice, the offender ſhall be ſummoned, and on default of appearing, the juſtice ſhall iſſue his warrant to apprehend and bring him before him; and being convicted on oath of one witneſs, or confeſſion, he ſhall forfeit 20*s.* half to the informer, and half to the owner of the bent, by diſtreſs; and for want of ſufficient diſtreſs, to be ſent to the houſe of correction for three months, to be kept to hard labour; and for a ſecond offence, to be committed to the houſe of correction for one year, to be whipt and kept to hard labour.

And if any ſtarr or bent ſhall be found within five miles of the ſaid ſand hills, the perſons convicted of having the ſame in cuſtody ſhall forfeit 20*s.* in like manner, and for want of ſufficient diſtreſs ſhall

ſhall ſuffer three months impriſonment, and hard labour in the houſe of correction.

But this ſhall not reſtrain any perſons from the exerciſe of any ancient preſcriptive right, to cut ſtarr or bent on the ſea coaſts in the county of *Cumberland*. 15 & 16 *G*. 2. *c*. 33. *ſ*. 6, 7, 8.

Bigamy.

AS *bigamy* in our law ſeems for the moſt part to be uſed to ſignify the having of two wives ſucceſſively one after the other, I ſhall take the liberty to transfer the offence which is commonly treated of under this title unto the title **Polygamy**, which ſignifies more properly the having two or more wives or huſbands at the ſame time.

Billets. See Fuel.

Black act.

IN order to avoid repeating the ſame regulations ſo many times over, as the offences hereunder mentioned are treated of under their reſpective titles in the different parts of this book; it is thought proper, to inſert here at large, the whole law relating to them all together, and to refer from thence to this title for the knowledge of the ſeveral particulars.

By the 9 *G*. *c*. 22. (commonly called the *Black act*) the which is required to be read at every ſeſſions and leet; and by the 6 *G*. 2. *c*. 37. and the 10 *G*. 2. *c*. 32. which are incorporated with the Black act, and therewith have continuance (by 24 *G*. 2. *c*. 57.) to *Sep*. 1. 1757, *&c*. and by the 27 *G*. 2. *c*. 15. it is enacted as followeth:

If any perſon or perſons, being armed with ſwords, fire-arms, or other offenſive weapons, and having his or their faces blacked, or being otherwiſe diſguiſed, ſhall (1) appear in any foreſt, chaſe, park, paddock, or grounds incloſed with any wall, pale, or other fence, wherein any deer have been or ſhall be uſually kept, or (2) in any warren or place where hares or conies have been or ſhall be uſually kept, or (3) in any high road, open heath, common, or down; or (4) ſhall unlawfully and wilfully hunt, wound, kill, deſtroy, or ſteal any red or fallow deer; or (5) unlawfully rob any warren or place where conies or hares are uſually kept; or (6) ſhall unlawfully ſteal or take away any fiſh out of any river or pond:

Or if any perſon or perſons *(that is, whether armed and diſguiſed or not)* ſhall (7) unlawfully and wilfully hunt, wound, kill, deſtroy, or ſteal any red or fallow deer, fed or kept in any places in any of the king's foreſts or chaſes, which are or ſhall be incloſed with pales, rails, or other fences; or in any park, paddock, or grounds incloſed, where deer have been or ſhall be uſually kept; or (8) ſhall unlawfully and maliciouſly break down the head or mound of any fiſh pond, whereby the fiſh ſhall be loſt or deſtroyed; or (9) ſhall unlawfully and maliciouſly kill, maim, or wound any cattle; or (10) cut down or otherwiſe deſtroy any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, ſhelter, or profit; or (11) ſhall ſet fire to any houſe, barn, or outhouſe, or to any hovel, cock, mow, or ſtack of corn, ſtraw, hay, or wood; or (12) ſhall wilfully and maliciouſly ſhoot at any perſon in any dwelling houſe, or other place; or (13) ſhall knowingly ſend any letter, without any name ſubſcribed thereto, or ſigned with a fictitious name, demanding money, veniſon, or other valuable thing; [or threatening to kill or murder any of his majeſty's ſubjects, or to burn their houſes, outhouſes, barns, ſtacks of corn or grain, hay or ſtraw; 27 *G.* 2. *c.* 15.] or (14) ſhall forcibly reſcue any perſon being lawfully in cuſtody of any officer or other perſon, for any the ſaid offences; or (15) ſhall by gift or promiſe of money, or other reward, procure any of his majeſty's ſubjects to join him or them in any ſuch unlawful act; or (16) ſhall unlawfully and maliciouſly break down, or cut down the bank of any river, or any ſea bank, whereby any lands ſhall be overflowed or damaged; or (17) ſhall unlawfully and maliciouſly cut any hop binds growing on poles in any plantation of hops; or (18) ſhall wilfully and maliciouſly ſet on fire, or cauſe to be ſet on fire, any mine, pit, or delph of coal or cannel coal:

Every perſon ſo offending, being thereof lawfully convicted (in any county in *England)* ſhall be adjudged guilty of felony, and ſhall ſuffer death as in caſes of felony, without benefit of clergy; but not to work corruption of blood, nor forfeiture of lands or goods.

Note; I have added the words above *(whether armed and diſguiſed or not)* to obviate an error, as I take it, which runs thro' moſt of the books, in a very material part of this ſtatute. They do ſuppoſe that a perſon muſt be *armed and diſguiſed* to commit any of the offences abovementioned, even the ſending of a threatning letter, or perſuading another to be an accomplice; whereas it ſeemeth ſomewhat clear, that to be armed and diſguiſed is only neceſſary to conſtitute any of the ſix firſt offences, and that any perſon whatſoever may be guilty of any of the other following offences, whether armed and diſguiſed or not.

And for the more eaſy and ſpeedy bringing the offenders to juſtice, if any perſon ſhall be charged with being guilty of any the ſaid offences, before any two juſtices where the offence ſhall be committed, by information of one or more credible perſons on oath by them to be ſubſcribed, the ſaid juſtices ſhall forthwith certify under their hands and ſeals, and return ſuch information to

one of the principal ſecretaries of ſtate; who ſhall lay the ſame, as ſoon as conveniently may be, before the king in his privy council: whereupon the king may make order in ſuch his council, requiring the offender to ſurrender himſelf in forty days, to any of the juſtices of the king's bench, or to any juſtice of the peace, to the end that he may be forthcoming to anſwer the ſaid offence according to due courſe of law; which order ſhall be printed and publiſhed in the next gazette, and ſhall be forthwith tranſmitted to the ſheriff of the county where the offence was committed, and ſhall (in ſix days after receipt thereof) be proclaimed by him or his officers, between ten and two of the clock, in the market places, on the market days, of two market towns in the county, near the place where the offence was committed; and a true copy of ſuch order ſhall be affixed upon ſome publick place in ſuch market towns: And if ſuch offender ſhall not ſurrender himſelf purſuant to ſuch order, he ſhall from the day appointed for his ſurrender, be adjudged convicted and attainted of felony, and ſhall ſuffer pains of death, as in caſe of a perſon convicted and attainted by verdict and judgment of felony, without benefit of clergy. And the court of king's bench, or judges of aſſize, on producing to them ſuch order in council, under the ſeal of the ſaid council, may award execution accordingly.

And if any perſon, after the time appointed for ſurrender ſhall be expired, ſhall conceal, aid, abet, or ſuccour ſuch offender, knowing him to have been ſo charged, and to have been required to ſurrender himſelf by ſuch order, and ſhall be lawfully convicted thereof; he ſhall be guilty of felony without benefit of clergy.

But this ſhall not hinder any judge, juſtice of the peace, magiſtrate, officer, or miniſter of juſtice, from apprehending and ſecuring ſuch offender, by the ordinary courſe of law: And if he be taken and ſecured before the time of ſurrender, he ſhall have his trial by due courſe of law.

And the inhabitants of the hundred ſhall make ſatisfaction (not exceeding 200 *l.*) for the damages ſuſtained by the killing or maiming of cattle; cutting down or deſtroying trees; ſetting fire to any houſe, barn, or outhouſe, hovel, cock, mow, or ſtack of corn, ſtraw, hay, or wood; breaking or cutting down the bank of any river, or any ſea bank, whereby any lands ſhall be overflowed or damaged; cutting hop binds growing on poles in any plantation of hops; ſetting on fire, or cauſing to be ſet on fire, any mine, pit, or delph of coal or cannel coal; the ſame to be rateably taxed and levied, as in caſes of robbery by the ſtatute of 27 *El. c.* 13.

But no perſon ſhall be inabled to recover damages, unleſs he ſhall by himſelf or ſervant, in two days after the damage done, give notive of the offence unto ſome of the inhabitants of ſome town, village, or hamlet near to the place where the fact was committed; and ſhall, in four days after ſuch notice, give in his examination on oath, or the examination on oath of his ſervant who had the care of the ſame, before a juſtice inhabiting in or near the hundred, whether he knows the perſon or perſons that

committed

committed the fact, or any of them; and if upon ſuch examination it be confeſſed, that the examinant knows the ſaid perſons or any of them, then ſuch perſon confeſſing ſhall be bound by recognizance to proſecute the offender by indictment or otherwiſe according to law.

And if an offender be apprehended and lawfully convicted, in ſix months after the offence committed, the hundred ſhall not be liable.

And the action ſhall not be commenced but within one year after the offence committed.

And if any perſon ſhall apprehend, or cauſe to be convicted, any ſuch offender abovementioned, and ſhall be killed, or wounded ſo as to loſe an eye, or the uſe of any limb, in apprehending or ſecuring, or endeavouring to apprehend or ſecure any ſuch offender; on proof thereof made at the ſeſſions where the offence was committed, or the party killed or wounded, by the perſon ſo apprehending and cauſing the offender to be convicted, or the perſon ſo wounded, or the executors or adminiſtrators of the party killed, the juſtices ſhall give a certificate thereof to the perſon wounded, or to the executors or adminiſtrators of the perſon killed; by which they ſhall be intitled to receive of the ſheriff 50*l.* to be allowed in his accounts; which he ſhall pay in thirty days from the time the certificate ſhall be ſhewed to him, on pain of forfeiting to the party 10*l.* for which, and for the penalty, the party may bring his action.

Black lead.

IT having been found by experience, that wad, or black cawke, commonly called black lead, is neceſſary for divers uſeful purpoſes, and more particularly in the caſting of bomb ſhells, round ſhot, and cannon balls, and that the ſame hath been diſcovered in one mountain or ridge of hills only in this realm, and great deſtruction having been made thereof of late years by evil diſpoſed perſons; therefore it is enacted, that every perſon who ſhall unlawfully break, or by force enter into, any mine or wad hole of wad or black cawke, commonly called black lead, or into any pit, ſhaft, or vein thereof; or ſhall unlawfully take and carry away from thence any wad, black cawke, or black lead; or ſhall aid, hire, or command any perſon to commit any the ſaid offences, ſhall be guilty of felony, and the court or judge may order him to be committed to priſon, or the houſe of correction not exceeding one year, to be kept to hard labour, and to be publickly whipt by the common hangman, or by the maſter of ſuch houſe of correction, at the times, and places, and in ſuch manner as the court ſhall think proper; or he may be tranſported for a term not exceeding ſeven years; and if he ſhall voluntarily eſcape, or break priſon, or return from tranſportation before the

time, he shall be guilty of felony without benefit of clergy. 25 *G.* 2. *c.* 10. *s.* 1.

And if any person shall buy or receive any such wad, knowing the same to be unlawfully taken and carried away as aforesaid, he shall be guilty of felony, and be liable to all the penalties inflicted by the laws on persons knowingly buying or receiving stolen goods. *s.* 3.

Blasphemy and profaneness.

Blasphemy.

1. ALL blasphemies against god, as denying his being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the holy scriptures, or exposing any part of them to contempt or ridicule; impostures in religion, as falsely pretending to extraordinary commissions from god, and terrifying or abusing the people with false denunciations of judgments; and all open lewdness grossly scandalous — are punishable by fine and imprisonment, and also such corporal punishment as to the court shall seem meet, according to the heinousness of the crime. 1 *Hawk.* 6, 7.

Depraving the established religion.

2. Also seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace. 1 *Hawk.* 7.

Denying the trinity.

3. No person shall have any benefit of the toleration act, who shall deny in his preaching or writing, the doctrine of the blessed trinity, as it is set forth in the 39 articles. 1 *W. Sess.* 1. *c.* 18. *s.* 17.

Representing the deity in stage plays.

4. If any person shall in any stage play, interlude, shew, maygame, or pageant, jestingly or profanely speak or use the holy name of god, or of Christ Jesus, or of the holy ghost, or of the trinity; he shall forfeit 10 *l.* half to the king, and half to him that shall sue. 3 *J.* *c.* 21.

Christians depraving the christian religion.

5. If any person having been educated in, or at any time having made profession of the christian religion in this realm, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy trinity to be god; or shall assert or maintain there are more gods than one; or shall deny the christian religion to be true, or the holy scriptures to be of divine authority; and shall be convicted thereof, in any of the courts at *Westminster*, or at the assizes, on the oaths of two witnesses, he shall for the first offence be incapable to have any office ecclesiastical, civil, or military (unless he shall renounce such opinion in the court where he was convicted within four months after such conviction); and for the second offence, he shall be disabled to be plaintiff, guardian, executor, or administrator, to take any gift or legacy, or to bear any office, and shall be imprisoned for three years. 9 & 10 *W.* *c.* 32.

But

But no perſon ſhall be proſecuted for any words ſpoken, unleſs the information be given to a juſtice of the peace, within four days after the words ſpoken, and the proſecution of ſuch offence be within three months after ſuch information. *id.*

6. *M.* 1 *G.* 2. *K.* and *Curl.* An information was exhibited by the attorney general, againſt *Edmond Curl*, for printing and publiſhing *(obſcænum libellum)* an obſcene book, called *Venus in the cloiſter*, or *the nun in her ſmock*, ſetting out the ſeveral lewd paſſages, and concluding againſt the peace. And of this the defendant was found guilty. It was moved in arreſt of judgment, that however the defendant may be puniſhable for this in the ſpiritual court, as an offence againſt good manners; yet it cannot be a libel, for which he is puniſhable in the temporal courts. But after long debate and conſideration, the court at laſt gave it as their unanimous opinion, that this was a temporal offence; and the defendant was ſet in the pillory. *Str.* 788. Caſe of Edmond Curl.

7. *E.* 2 *G.* 2. *K.* and *Woolſton.* He was convicted on four informations, for his blaſphemous diſcourſes on the miracles of our ſaviour. And attempting to move in arreſt of judgment, the court declared they would not ſuffer it to be debated, whether to write againſt chriſtianity *in general* was not an offence puniſhable in the temporal courts at common law: They deſired it might be taken notice of, that they laid their ſtreſs upon the word *general*, and did not intend to include diſputes between learned men upon particular controverted points. The next term he was brought up, and fined 25 *l.* for each of his four diſcourſes, to ſuffer a year's impriſonment, and to enter into a recognizance for his good behaviour during his life, himſelf in 3000 *l.* and 2000 *l.* by others. *Str.* 834. Caſe of Thomas Woolſton.

8. In the year 1656, *James Nayler* for perſonating our ſaviour, and ſuffering his followers to worſhip him, and pay him divine honours, was ſentenced to be ſet in the pillory, and to have his tongue bored thro' with a red hot iron, and to be whipped, and ſtigmatized in the forehead with the letter B. Caſe of James Nayler.

9. All perſons in or belonging to his majeſty's ſhips or veſſels of war, being guilty of profane oaths, curſings, execrations, drunkenneſs, uncleanneſs, or other ſcandalous actions, in derogation of god's honour, and corruption of good manners, ſhall incur ſuch puniſhment as a court martial ſhall think fit to impoſe. 22 *G.* 2. *c.* 33. *Art.* 2. Navy.

For profane curſing and ſwearing, ſee title **Swearing.**

Blood corrupted. See Forfeiture.

Bone-lace. See Buttons.

Books.

IF any book ſhall be taken or otherwiſe loſt out of any parochial library; any juſtice may grant his warrant to ſearch for it; and if it ſhall be found, it ſhall by order of ſuch juſtice be reſtored to the library. 7 *An. c.* 14. *ſ.* 10.

Books popiſh. See Popery.

Bows. See Game.

Brandy. See Exciſe.

Braſs. See Pewter.

Bread.

NOTE; The ſtatutes hereafter following of 8 *An. c.* 18. 1 *G. ſt.* 2. *c.* 26. and 22 *G.* 2. *c.* 46. are but temporary, and by the laſt mentioned act of 22 *G.* 2. have continuance to *Sep.* 1. 1757, *&c.*

Conſpiring to raiſe the price.

1. If any bakers ſhall conſpire not to ſell bread but at certain prices; every ſuch perſon ſhall forfeit 10 *l.* for the firſt offence; and if not paid in ſix days, he ſhall be impriſoned twenty days, and have only bread and water for his ſuſtenance; for the ſecond offence 20 *l.* or the pillory; and for the third offence 40 *l.* or the pillory, and loſs of an ear, and to become infamous. And the ſeſſions or leet may hear and determine the ſame. 2 *&* 3 *Ed.* 6. *c.* 15.

Aſſize to be ſet.

2. The mayor, or chief magiſtrate, and where there are none ſuch, two juſtices ſhall from time to time ſet the aſſize and weight of bread, having regard to the price of the grain, and making reaſonable allowance to the bakers; which ſhall be ſet in *averdupois*, and not *troy* weight, according to the following table:

The

The penny loaf.

Price of the bushel of wheat and baking.		White		Wheaten		Houshold		Price of the bushel of wheat and baking.		White		Wheaten		Houshold	
s.	d.	oz.	dr.	oz.	dr.	oz.	dr.	s.	d.	oz.	dr.	oz.	dr.	oz.	dr.
2	0	23	3	34	12	46	5	8	3	5	10	8	7	11	4
2	3	20	10	30	14	41	3	8	6	5	7	8	3	10	14
2	6	18	9	27	13	37	1	8	9	5	5	7	15	10	9
2	9	16	14	25	4	33	11	9	0	5	2	7	12	10	5
3	0	15	7	23	3	30	14	9	3	5	0	7	8	10	0
3	3	14	4	21	6	28	8	9	6	4	14	7	5	9	12
3	6	13	4	19	14	26	8	9	9	4	12	7	2	9	8
3	9	12	6	18	9	24	11	10	0	4	10	6	15	9	4
4	0	11	9	17	6	23	3	10	3	4	8	6	13	9	1
4	3	10	14	16	6	21	13	10	6	4	7	6	10	8	13
4	6	10	5	15	7	20	10	10	9	4	5	6	7	8	10
4	9	9	12	14	10	19	8	11	0	4	3	6	5	8	7
5	0	9	4	13	14	18	9	11	3	4	2	6	3	8	4
5	3	8	13	13	4	17	10	11	6	4	0	6	1	8	1
5	6	8	7	12	10	16	14	11	9	3	15	5	15	7	14
5	9	8	1	12	1	16	2	12	0	3	14	5	13	7	12
6	0	7	12	11	9	15	7	12	3	3	13	5	11	7	9
6	3	7	7	11	2	14	13	12	6	3	11	5	9	7	7
6	6	7	2	10	11	14	4	12	9	3	10	5	7	7	4
6	9	6	14	10	5	13	12	13	0	3	9	5	6	7	2
7	0	6	10	9	15	13	4	13	3	3	8	5	4	7	0
7	3	6	6	9	9	12	13	13	6	3	7	5	2	6	14
7	6	6	3	9	4	12	6	13	9	3	6	5	1	6	12
7	9	6	0	9	0	11	15	14	0	3	5	4	15	6	10
8	0	5	13	8	11	11	9	14	3	3	4	4	14	6	8
								14	6	3	3	4	13	6	6
								14	9	3	2	4	11	6	5
								15	0	3	1	4	10	6	3

8 An. c. 18. ſ. 2.

3. Explanation of the foregoing table:

In the firſt column is the price of the buſhel of wheat, from 2*s.* to 15*s.* a buſhel, the allowance of the magiſtrates to the baker for baking being included; and in the other columns is the weight of the ſeveral loaves: So that, for example, if the price of wheat is 5*s.* a buſhel, and the magiſtrates allow 1*s.* 6*d.* to the baker for baking, then oppoſite to 6*s.* 6*d.* in the firſt column, Explanation of the foregoing table.

column, will be found the weight of the ſeveral loaves; but if the price is 3*s.* a buſhel, and the allowance 1*s.* then the weight of the ſaid loaves will be found over againſt 4*s.* and ſo of the reſt.

By which table may eaſily be aſcertained the weight of larger loaves, by addition; as for example, a two penny loaf (when wheat is at the ſame rate) is twice as much as the penny loaf, the ſix penny loaf ſix times as much, and the eighteen penny loaf eighteen times as much.

Note; The white loaves are half, and the wheaten three quarters of the weight of houſhold loaves.

Price of corn to be certified.

4. And that the aſſize may be truly ſet, the prices of grain, meal, and flour in the adjacent markets ſhall be certified to the ſaid magiſtrates reſpectively, on oath, by the clerks of the market, or ſuch other perſon or perſons as they ſhall appoint. 1 *G. ſt.* 2. *c.* 26. *ſ.* 7.

Bread to be marked.

5. And the ſaid officers may direct, how each ſort ſhall be marked, for knowing the baker, price, weight, and ſort. 8 *An. c.* 18. *ſ.* 3.

Letters thereon.

6. And more particularly, the maker of bread for ſale ſhall imprint on every loaf of white bread a large Roman W; of wheaten bread, a large Roman W H; of houſhold bread, a large Roman H; on pain of 20*s.* to the informer, on conviction by confeſſion or oath of one witneſs, before ſuch chief magiſtrate or one juſtice, to be levied by way of diſtreſs; the proſecution to be commenced in three days, and the conviction to be certified to the next ſeſſions, to be there kept on record, and to be ſeen without fee. 22 *G.* 2. *c.* 46. *ſ.* 21.

Other regulations.

7. And they ſhall make ſuch other rules for regulating the baking of bread, and all things concerning the ſame, as they ſhall find convenient. 8 *An. c.* 18. *ſ.* 3.

Mixing grain.

8. And if any baker ſhall put into bread any mixture of any other grain than what is appointed by the aſſize; he ſhall forfeit 20*s.* in like manner. 8 *An. c.* 18. *ſ.* 3, 4, 5, 7.

Want of weight.

9. And if any baker or other ſhall bake, ſell, or expoſe to ſale any bread deficient in weight one ounce or more; and be convicted (A) thereof in like manner, he ſhall forfeit to the informer 5*s.* for every ounce wanting; and if there want leſs than an ounce 2*s.* 6*d.* Complaint to be made in 24 hours within the bills, and within three days elſewhere. 1 *G. ſt.* 2. *c.* 26. *ſ.* 5.

Searching and weighing.

10. And the mayor, chief magiſtrate, or juſtice may in the day time enter any houſe, ſhop, ſtall, bakehouſe, warehouſe, or outhouſe of any baker or ſeller of bread, to ſearch for, view, and try the bread; and if any be deficient either in ſort, goodneſs, baking, working, weight, or marking, they may ſeize the ſame, and give it to the poor: Any baker or ſeller reſiding, ſhall forfeit to the informer 40*s.* in like manner. 8 *An. c.* 18. *ſ.* 8.

General penalty.

11. As to other defaults in general; a baker not obſerving ſuch regulations as ſhall be made as above, ſhall on conviction (as before) forfeit to the informer 40*s.* to be levied by way of diſtreſs. 8 *An. c.* 18. *ſ.* 3.

12. Any party aggrieved may appeal in writing to the next sessions: and the court may award costs to the prosecutor, and commit the offender till he pay the costs, and also the penalty; they may also award costs to the appellant, to be recovered in like manner. 8 *An. c.* 18. *s.* 6. Appeal.

13. Any magistrate omitting his duty herein, shall forfeit 20 *s.* to be recovered by action at law. 8 *An. c.* 18. *s.* 7. Magistrate omitting his duty.

14. But nothing herein shall prejudice the right or custom of the city of *London*; or the lord of any leet, to set, inquire, and punish the breach of assize of bread, within the leet or view of frankpledge; nor of the clerk of the market. 8 *An. c.* 18. *s.* 10. Exceptions.

15. By the 3 *G.* 2. *c.* 29. *s.* 2. If any shall sell or expose to sale any peck, half peck, or quartern loaf at a higher price than is set by the assize, he shall forfeit 10 *s.* in like manner as above. Peck loaves included in the assize.

But it is to be observed, that this act hath not continuance with the others abovementioned; but yet it shews the sense of the legislature, that peck, half peck, and quarter loaves may be included within the assize, altho' not mentioned particularly in the table of assize in the act; and then the penalty for this offence (supposing this clause is expired) will be comprehended within the general clause of offences against the magistrates regulations abovementioned.

16. Mr. *Barlow*, on consideration of the whole, makes a doubt, whether the penalties can be levied, or the bread be forfeited, if there be no previous assize set; and with good reason: since it is hard to determine that bread is under weight, or exceeds in price, when no price or weight is fixed, and when the value neither of the corn nor labour is ascertained. No penalty where the assize is not set.

A. Conviction, and warrant to levy the penalty and distribute the bread to the poor; on 8 *An. c.* 18. and 1 *G. st.* 2. *c.* 26.

Westmorland. { To the constable of &c.

WHEREAS A. I. *of* ——— *in the said county, yeoman, came this day before me* J. P. *esquire, one of his majesty's justices of the peace for the said county, and made information on oath, that* A. O. *of* ——— *aforesaid, yeoman, did this day expose to sale nine sixpenny loaves of bread deficient in their respective due weights, according to the assize of bread established by a statute made in the eighth year of the reign of her late majesty queen* Anne, *and continued by several other subsequent statutes; And whereas I did forthwith go to the shop of the said* A. O. *in* ——— *aforesaid, and the said shop in the day time did enter, and there did find nine six penny loaves of wheaten bread, exposed to sale, and did cause the same to be severally weighed, and found the same to be severally deficient in their due weight one ounce each, according to the assize last settled in the said town of* ——— *pursuant to the said statute made in the eighth year of the reign of her late majesty queen* Anne: *I do therefore hereby adjudge the*

the said A. O. *to be guilty of the said offence in manner aforesaid, and that he hath forfeited the said nine sixpenny loaves for the use of the poor of the parish of* ——— *aforesaid, within which parish the said shop of the said* A. O. *is: And I do hereby command you to take the said nine loaves and distribute them amongst the said poor: And I do also adjudge, that by virtue of a statute made in the first year of the reign of his late majesty king* George *the first, the said* A. O. *hath by reason of his said offence incurred the forfeiture of* 45 s. *to the use of the said* A. I. *These are therefore to command you forthwith to distrain the goods and chattels of him the said* A. O. *And if the said sum of* 45 s. *shall not be paid in* [*seven*] *days time from the taking of the said distress, together with reasonable charges of taking and keeping the same, that then you do sell the said goods and chattels so distrained, and out of the money arising by such sale pay to the said* A. I. *the aforesaid sum of* ——— *rendring the overplus upon demand unto him the said* A. O. *the reasonable charges of taking, keeping, and selling the said distress being first deducted. And for so doing this shall be your sufficient warrant. Given under my hand and seal, at* ——— *in the said county, the* ——— *day of* &c.

Breaking gaol. See **Prison breaking.**

Breaking open doors. See **Arrest.**

Brewers. See **Excise.**

Bribery.

BRIBERY in a strict sense is taken for a great misprision of one in a judicial place, taking any thing whatsoever, except meat and drink of small value, of any one who has to do before him any way, for doing his office, or by colour of his office, but of the king only; and is punishable at the common law by fine and imprisonment. 1 *Hawk.* c. 67.

Bridges.

NOTE; This title treateth only of county bridges: Those which are under the cognizance of the surveyor of the highways, as being repaired by the several parishes or districts, are treated of under the title **Highways.**

I. Who shall repair.
II. Power of the leet to inquire thereof.
III. Power of the justices in sessions.
IV. Concerning the 300 foot at the ends of bridges.
V. Indictment of bridges.
VI. Charges of repairing.
VII. Surveyors of the work.
VIII. Manner of repairing.
IX. Purchasing lands adjoining.
X. Contracting for a term of years.

I. Who shall repair.

1. By the great charter, 9 *H.* 3. *c.* 15. *No town nor freeman shall be distrained to make bridges nor banks, but such as of old time and of right have been accustomed.*

2. And none can be compelled to make new bridges, where never any were before, but by act of parliament. 2 *Inst.* 701.

3. By the common law, some persons (spiritual or temporal, corporate or not corporate) are bound to repair bridges by reason of the *tenure* of their lands or tenements; and some by reason of *prescription* only:

By *tenure*, by reason that they and those whose estate they have in the lands or tenements, are bound in respect thereof to repair the same. 2 *Inst.* 700.

By reason of *prescription* only; but herein there is a diversity between bodies politick or corporate, spiritual or temporal, and natural persons: for bodies politick or corporate, spiritual or temporal, may be bound by usage and prescription only, because they are local, and have a succession perpetual; but a natural person cannot be bound by act of his ancestor, without a lien, or binding, and assets. 2 *Inst.* 700.

And if a man make a bridge for the common good of all the subjects, he is not bound to repair it; for no particular man is bound to reparation of bridges by the common law, but by tenure or prescription. 2 *Inst.* 701.

4. And if none are bounden by tenure or prescription at common law, then the whole county or franchise shall repair it. 2 *Inst.* 701.

Concerning

Concerning which, it is enacted by the 22 *H.* 8. *c.* 5. as follows: *Whereas in many places it cannot be known and proved, what hundred, town, parish, person, or body politick ought to repair bridges broken in the highways; in every such case, the said bridges, if they be without a city, or town corporate, shall be made by the inhabitants of the county; if within a city or town corporate, then by the inhabitants of such city or town corporate; if part be in one shire, city, or town corporate, and part in another, or part within the limits of a city or town corporate, and part without, the inhabitants of the shires, cities or towns corporate, shall repair such part as lies within their limits.* s. 3.

Bridges broken in the highways] This extendeth only to common bridges in the king's highways, and not to private bridges to mills, or the like; the remedy in which case is not by indictment, but by action. 2 *Inst.* 701.

Within a city or town corporate] It hath been questioned, whether a borough which hath no bridge within its own limits, be not liable to contribute to the repairs of a county bridge. 1 *Haw.* 225.

5. A tenant at will of an house, which adjoins to a common bridge, is bound to repair the house, so that the publick be not prejudiced by the want of repair, altho' he be not bound to repair as to his landlord. L. *Raym.* 856.

6. The freehold of bridges is in him that hath the freehold of the soil; but the free passage is for all the king's liege people. 2 *Inst.* 705.

II. Power of the leet to inquire thereof.

Decays of bridges are presentable in the leet, or torn. 2 *Inst.* 701.

III. Power of the justices in sessions.

The justices, or four of them at the least (1 Q.) shall have power to inquire, hear, and determine in the general sessions, of all manner of annoyances of bridges broken in the highways, to the damage of the king's liege people, and to make such process and pains upon every presentment, against such as ought to be charged to make or amend them, as the king's bench usually doth, or as it shall seem by their discretions to be necessary and convenient, for the speedy amendment of such bridges. 22 H. 8. c. 5. s. 1.

Four of them at the least] If the bridge be within a franchise, which hath not four justices, and a sessions of its own, the justices of the county shall inquire: but if the franchise be a county of itself, and hath not four justices (1 *Q.*) it is not within this statute, but is left to the remedy which it had at common law. 2 *Inst.* 702.

And to make process] Where the bridge is in one shire, and the persons or lands which ought to be charged are in another shire; or

or where the bridge is within a city or town corporate, and the persons or lands that ought to be charged are out of the said city; the justices of such shire, city, or town corporate, shall have power to hear and determine such annoyances, being within the limits of their commission: and if the annoyance be presented, then to make process into every shire of the realm, against such as ought to repair the same, and to do further in every behalf, as they might do, if the persons or lands chargeable were in the same shire, city, or town corporate where the annoyance is. 22 *H.* 8. *c.* 5. *s.* 5.

As the king's bench usually doth] The presentment at common law, might be before the king's bench, or at the assizes. 2 *Inst.* 701.

IV. Concerning the 300 foot at the ends of bridges.

Such part and portion of the highways, as well within franchise as without, as lie next adjoining to any ends of any bridges, distant from any of the said ends by the space of 300 foot, shall be made, repaired, and amended as often as need shall require; and the justices, or four of them (1 Q.) *shall have power to enquire, hear and determine, in the general sessions, all manner of annoyances of and in such highways, so being and lying next adjoining to any ends of bridges, distant from any one of the ends of such bridges 300 foot, and to do in every thing concerning the making, repairing, and amending of such highways, in as ample manner as they may do for the making, repairing, and amending of bridges.* 22 H. 8. c. 5. s. 9.

V. Indictment of bridges.

1. *No money shall be applied to the repair of bridges, until presentment be made by the grand jury at the assizes or sessions, of their insufficiency, inconveniency, or want of reparation.* 12 G. 2. c. 29. s. 13.

2. An indictment for not repairing a bridge, ought to shew what sort of bridge it is, whether for carts and carriages, or for horses, or for footmen only. L. *Raym.* 1175.

3. If a man be indicted for that by reason of the tenure of certain lands he is bound to repair a bridge, it must be alledged where those lands lie. 2 *H. H.* 181.

4. Any particular inhabitant of a county, or tenant of land charged to the repairs of a bridge, may be made defendant to an indictment for not repairing it, and be liable to pay the whole fine assessed by the court, for the default of repairs, and shall be put to his remedy at law for a contribution from those, who are bound to bear a proportionable share in the charge; for the necessity of the case requires the greatest expedition in cases of this nature. 1 *Haw.* 221.

5. It hath been resolved, that it is not sufficient for the defendants to an indictment for not repairing a bridge, to excuse themselves, by shewing either that they are not bound to repair the whole, or any part of the bridge, without shewing what other

person

perſon is bound to repair the ſame; and it is ſaid, that in ſuch caſe the whole charge ſhall be laid upon ſuch defendants, by reaſon of their ill plea. 1 *Haw.* 221.

6. It ſeemeth, that no inhabitant of a county ought to be a juror, for the trial of an iſſue, whether the county be bound to ſuch repairs or not; and therefore the jury muſt come from ſome adjacent county: but by the ſtatute of 1 *An. ſt.* 1. *c.* 18. ſuch inhabitant may be a good witneſs. 1 *Haw.* 222.

7. *No fine, iſſue, penalty, or forfeiture, upon any preſentment or indictment for not repairing bridges, or the highways at the ends of bridges, ſhall be returned into the exchequer, but ſhall be paid to the treaſurer, to be applied towards the ſaid repairs, and not otherwiſe.* 1 An. ſt. 1. c. 18. ſ. 4.

8. *And no preſentment or indictment for not repairing bridges, or highways at the ends of bridges, ſhall be removed by* certiorari *out of the county into any other court.* 1 An. ſt. 1. c. 18. ſ. 5.

But a *certiorari* lies to remove an order made by the juſtices, concerning the repair of a bridge, purſuant to a private act of parliament; and the juſtices ought to return the private act upon which their order is founded. *Dalt.* 504.

E. 4 *G.* 2. *K.* and the inhabitants of *Hamworth.* Upon motion to quaſh a *certiorari* to remove an indictment againſt the defendants at ſeſſions, for not repairing a bridge; it was inſiſted, that by the 1 *An. c.* 18. the *certiorari* is taken away. To which it was anſwered, and reſolved by the court, that this act extended only to bridges where the county is charged to repair; and that where a private perſon or pariſh is charged, and the right will come in queſtion, the act of the 5 & 6 *W. c.* 11. had allowed the granting a *certiorari.* And therefore they refuſed to quaſh. *Str.* 900.

VI. Charges of repairing.

By the 12 *G.* 2. *c.* 29. The charges of repairing and amending bridges, and highways at the ends of bridges, ſhall be paid out of the general county rate. *ſ.* 1.

VII. Surveyors of the work.

The four juſtices in ſeſſions as aforeſaid may appoint two ſurveyors, with ſalaries, to ſee the bridges amended. 22 *H* 8. *c.* 5. *ſ.* 4.

And this buſineſs of ſurveying the bridges, for the more convenience, is uſually annexed by the juſtices to the office of the high conſtables; for which they have by this clauſe power to allow them ſalaries.

VIII. Manner of repairing.

1. It ſeemeth to be clear, that thoſe who are bound to repair bridges, muſt make them of ſuch height and ſtrength, as ſhall be anſwerable to the courſe of the water, whether it continue in the old channel, or make a new one. 1 *Haw.* 221.

2. And

2. And persons are not trespassers, for entring on any adjoining land, for repairing bridges, or laying thereon the requisite materials. 1 *Haw.* 221.

IX. Purchasing lands adjoining.

The justices at their sessions may purchase any parcel of land, adjoining or near to any county bridge, for the more commodious enlarging, or convenient rebuilding the same, not exceeding one acre, to be paid for by the treasurer out of the county rates, by order under the hands and seals of the said justices in their said sessions; which lands so purchased, shall be conveyed to such person or persons as the justices in the said sessions shall appoint, in trust, for enlarging or rebuilding the said bridges. 14 G. 2. c. 33.

X. Contracting for a term of years.

By the 12 G. 2. c. 29. s. 14. *When any publick bridges, ramparts, banks, or cops, are to be repaired at the expence of the county, the justices at their general or quarter sessions, after presentment made by the grand jury of their want of reparation, may contract with any person for rebuilding, repairing, and amending the same, for any term not exceeding seven years, at a certain annual sum.*

In order to which they shall give publick notice of their intention of contracting with any person, for rebuilding, repairing, and amending the same.

And such contracts shall be made at the most reasonable price which shall be proposed by the contractors; who shall give sufficient security for the due performance thereof, to the clerk of the peace.

And all contracts when agreed to, and all orders relating thereto, shall be entred in a book to be kept by the clerk of the peace for that purpose; who shall keep the same amongst the records of the county, to be inspected by any of the justices at all seasonable times, and by any person employed by any parish or place contributing to the same, without fee.

Indictment for a bridge out of repair.

BY *the oaths of ——— good and lawful men of the county aforesaid, then and there sworn and charged to inquire for our said lord the king, and the body of the county aforesaid, it is presented, that a certain common bridge, over the river ——— commonly called ——— bridge, lying and being in the parish of ——— in the county aforesaid, in the king's common highway there, leading from the market town of ——— to the market town of ——— in the said county, altogether and from the time whereof the memory of man is not to the contrary, being a common king's highway for all the lieges and subjects of our said lord the king and of his ancestors, with their horses, carts, and carriages to go, pass, ride, and travel at their pleasure, on the ——— day of ——— in the ——— year of the reign of ——— was, and yet is in great decay, broken, and ruinous, so that the lieges and subjects of our said lord the king, upon and over the*

said

said bridge with their horses, carts, and carriages could not and cannot go, pass, ride, and travel, without great danger, to the grievous damage and nusance of all the lieges and subjects of our said lord the king, upon and over the same bridge going, passing, riding, and travelling, and against the peace of our said lord the king, his crown and dignity.

And that A O. *late of*—— *in the said county, gentleman, by reason of his tenure of certain lands lying in the parish of*——— *aforesaid, and elsewhere in the said county, ought to make, repair, and amend the said common bridge, as often as and when it shall be necessary.*

Buggery.

What it is.

1. BUGGERY (from the *Italian bugarone*, a buggerer, this vice being said to have been brought into *England* out of *Italy* by the *Lombards*) is a detestable and abominable sin, amongst christians not to be named, committed by carnal knowledge, against the ordinance of the creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast. 3 *Inst.* 58.

The punishment.

2. And by the statute of 25 *H.* 8. *c.* 6. Buggery committed with mankind or beast is made felony without benefit of clergy. And the justices of the peace may hear and determine the same, as in cases of other felonies.

Principal and accessary.

3. Which said statute making it felony generally, there may be accessaries both before and after. But those that are present, aiding and abetting, are all principals. And altho' none of the principals are admitted to their clergy, yet accessaries before and after are not excluded from clergy. 1 *H. H.* 670.

Infants.

4. If the party buggered be within the age of discretion (which is generally reckoned the age of 14), it is no felony in him, but in the agent only. But if buggery be committed upon a man of the age of discretion, it is felony in them both. 3 *Inst.* 59. 1 *H. H.* 670.

Navy.

5. By the articles of the navy (22 *G.* 2. *c.* 33.), if any person in the fleet shall commit the unnatural and detestable sin of buggery or sodomy, with man or beast; he shall be punished with death by the sentence of a court martial.

Pardon.

6. This crime is excepted out of the act of general pardon. 20 *G.* 2. *c.* 52. *s.* 17.

Bullion. See Coin.

Burglary.

Offences against the house of another, which fall short of burglary, belong to title **Larceny**, under the head **Larceny from the house.**

I. What is burglary.
II. Reward for convicting a burglar.

I. What is burglary.

1. THE word *burglar* seemeth to have been brought unto us out of *Germany* by the *Saxons*, and to be derived of the *German burg*, a house, and *larron*, a thief, probably from the *Latin latro, latronis.* Derivation of burglary.

2. Burglary *is a felony at common law, in breaking and entring the mansion house of another, in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not.* Hale's Pl. 79. Definition of burglary.

—*Breaking*] Every entrance into the house by a trespasser, is not a breaking in this case; but there must be an actual breaking. As if the door of a mansion house stand open, and the thief enter, this is no breaking. So it is if the window of the house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of the window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. 3 *Inst.* 64.

And Lord *Hale* says, these acts amount to an actual breaking; opening the casement, or breaking the glass window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 *H. H.* 552.

M. 8 *G. K.* and *Gray.* One of the *servants* in the house opened his lady's chamber door (which was fastened with a brass bolt) with design to commit a rape; and it was ruled to be burglary, and the defendant was convicted and transported. *Strange* 481.

By the statute of the 12 *An. c.* 7. If any person shall enter into the mansion house of another, by day or by night, without breaking the same, with an intent to commit felony, or being in such house shall commit any felony, and shall in the night time break the said house to get out, he shall be guilty of burglary, and ousted of the benefit of clergy, in the same manner as if he had broken and entred the house in the night time, with intent to commit felony.

M. 4 *G.* 2. *Joshua Cornwal's* case. He was indicted with another person for burglary. And upon the evidence it appeared, that he was a servant in the house, where the robbery was com-

mitted, and in the night time opened the ſtreet door, and let in the other priſoner, and ſhewed him the ſide-board, from whence the other priſoner took the plate: then the defendant opened the door and let him out; but the defendant did not go out with him, but went to bed. Upon the trial it was doubted, whether this was burglary in the ſervant, he not *going out* with the other. But afterwards at a meeting of all the judges at *Serjeant's-inn*, they were all of opinion that it was burglary in both, and not to be diſtinguiſhed from the caſe where one watches at the ſtreet end, whilſt another goes in and commits the burglary, which hath been often ruled to be burglary in both: and upon report of this opinion the defendant was executed. *Strange* 881.

And entring] It is deemed an entry, when the thief breaketh the houſe, and his body, or any part thereof, as his foot, or his arm, is within any part of the houſe; or when he putteth a gun into a window which he hath broken, or into a hole of the houſe which he hath made, of intent to murder or kill; this is an entry and breaking of the houſe: but if he doth barely break the houſe, without any ſuch entry at all, this is no burglary. 3 *Inſt.* 64.

If divers come in the night to do a burglary, and one of them break and enter, the reſt of them ſtanding to watch, at a diſtance, this is burglary in all. 3 *Inſt.* 64.

The manſion houſe] This includes alſo churches, and the walls or gates of a walled town. 1 *Haw.* 103.

Mr. *Hawkins* ſays, all out-buildings, as barns, ſtables, dairy houſes, adjoining to a houſe, are looked upon as part thereof; and conſequently burglary may be committed in them: but if they be removed at any diſtance from the houſe, it ſeems that it hath not been uſual of late to proceed againſt offences therein as burglaries. 1 *Haw.* 104.

And Lord *Hale* ſays more explicitly, the manſion houſe doth not only include the dwelling houſe, but alſo the outhouſes that are parcel thereof, as barn, ſtable, cow houſe, dairy houſe, if they are parcel of the meſſuage, tho' they are not under the ſame roof, or joining contiguous to it; and ſo, he ſays, it was agreed by all the judges: but if they be no parcel of the meſſuage, as if a man take a leaſe of a dwelling houſe from one, and of a barn from another; or if it be far remote from the dwelling houſe, and not ſo near to it as to be reaſonably eſteemed parcel thereof, as if it ſtand a bow-ſhot off from the houſe, and not within or near the curtilage of the chief houſe, then the breaking of it is not burglary, for it is not a manſion houſe, nor any part thereof. 1 *H. H.* 558, 9.

To break and enter a *ſhop*, not parcel of the manſion houſe, in which the ſhopkeeper never lodges, but only works or trades there in the day time, is not burglary, but only larceny; but if he, or his ſervant, uſually or often lodge in the ſhop at night, it is then a manſion-houſe, in which a burglary may be committed. 1 *H. H.* 557, 8.

It is not neceſſary, to make it burglary, that any perſon be actually in the houſe, at the very time of the offence committed. 1 *Haw.* 103.

In

In the night] As long as the day continues, whereby a man's countenance may be discerned, it is called day; and when darkness comes, and day light is past, so as by the light of day you cannot discern the countenance of a man, then it is called night. 3 *Inst.* 63.

And this doth aggravate the offence; since the night is the time wherein man is at rest, and wherein beasts run about seeking their prey. Hence in ancient records, the twylight was signified, when it was said, *inter canem & lupum* (between the dog and the wolf); for when the night begins, the dog sleeps, and the wolf seeketh his prey. 3 *Inst.* 63.

With intent to commit felony] There can be no burglary, but where the indictment both expressly alledges, and the verdict also finds, an intention to commit some felony; for if it appear, that the offender meant only to commit a trespass, as to beat the party, or the like, he is not guilty of burglary. 1 *Haw.* 105.

However, it seems the much better opinion, that an intention to commit a rape, or other such crime, which is made felony by statute, and was a trespass only at common law, will make a man guilty of burglary, as much as if such offence were a felony at common law; because where-ever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law. 1 *Haw.* 105.

Whether the felonious intent be executed or not] Thus they are burglars, who break any house, or church, in the night, altho' they take nothing away. And herein this offence differs from robbery, which requires that something be taken, tho' it is not material of what value.

Where a man commits burglary, and at the same time steals goods out of the house, it is also larceny; and if he be acquitted of the burglary, he may notwithstanding be indicted of the larceny; for they are several offences, tho' committed at the same time. And burglary may be, where there is no larceny; and larceny may be, where there is no burglary. 2 *H. H.* 246.

3. By the 18 *El. c.* 7. and 3 *W. c.* 9. Benefit of clergy is taken away in cases of burglary, both from the principal, and the accessary before; but in all cases of burglary, accessaries after must have their clergy. 2 *H. H.* 364. 1 *Haw.* 357, 8. Punishment thereof.

4. All burglaries and robberies of churches are excepted out of the general pardon, of the 20 *G.* 2. *c.* 52. Pardon.

II. Reward for convicting a burglar.

1. It may be observed, in the first place, that it is provided by the 24 *H.* 8. *c.* 5. that there shall be no forfeiture of lands or goods, for killing any person that attempts to commit burglary. Indemnity for killing him.

But besides this indulgence to a person killing such an offender in defence of his house, there are special advantages and rewards for apprehending and convicting him in due course of law; which are as follows:

2. By the 25 *G.* 2. *c.* 36. The charges of prosecuting and convicting a burglar, shall be paid by the treasurer of the county Charges of convicting him to be reimbursed.

where the burglary was committed, on producing to him the order of the court for that purpose, which the clerk of assize, or of the peace, shall make out, for the fee of 1 *s.* *s.* 11.

And also the charges of poor witnesses appearing on their recognizance, by the 27 *G.* 2. *c.* 3. on paying 6 *d.* for the order: except in *Middlesex*, where the same shall be paid by the overseers of the poor where the person was apprehended.

Exemption from parish offices for taking and convicting him.

3. Every person who shall apprehend any one guilty of burglary and prosecute him to conviction, shall have a certificate, without fee, under the hand of the judge, certifying such conviction, and within what parish or place the burglary was committed, and also that such burglar was discovered and taken, or discovered or taken, by the person so discovering or apprehending; and if any dispute arise between several persons so discovering or apprehending, the judge shall appoint the certificate into so many shares to be divided among the persons concerned, as to him shall seem just and reasonable:

And if any person shall happen to be slain by such burglar, in endeavouring to apprehend him, the executors or administrators of such person slain shall have the like certificate:

Which certificate shall be inrolled by the clerk of the peace of the county in which it shall be granted; for which he shall have 1 *s.* and no more:

And the said certificate may be once assigned over; and the original proprietor, or the assignee of the same, shall by virtue thereof be discharged from all manner of parish and ward offices, within the parish or ward where the felony was committed. 10 & 11 *W.* *c.* 23.

40 l. for taking and convicting.

4. And moreover, as a further reward, every person who shall apprehend any person guilty of burglary, and prosecute him to conviction, shall have a certificate under the hand of the judge, without fee, to be made out and delivered before the end of the assizes, certifying the conviction, and in what parish the burglary was committed, and also that the burglar was taken by the person claiming the reward; and if any dispute shall happen to arise between the persons claiming, the judge shall by the said certificate appoint the same to be paid amongst the parties claiming the same, in such share and proportion as to him shall seem just and reasonable:

And on tender of such certificate to the sheriff, and demand made, he shall pay to the person so intitled, the sum of 40 *l.* without fee or deduction, within one month after such tender and demand; on pain of forfeiting double, with treble costs. 5 *An.* *c.* 31. 6 *G.* *c.* 23. *s.* 10.

40 l. to the executors of a person killed.

5. And if any watchman, or any other person, be killed, in endeavouring to apprehend any such burglar, his executors or administrators shall have a certificate delivered under the hand and seal of the judge, or of the two next justices of the peace, of such person being so killed; which certificate they shall, on sufficient proof before them made, give without fee: whereupon, such executor or administrator shall be intitled to receive the like sum of 40 *l.* in like manner. 5 *An.* *c.* 31. *s.* 2.

6. And

6. And moreover, if any perſon, being out of priſon, ſhall commit any burglary, and afterwards diſcover two or more the like offenders, ſo as two or more be convicted; he ſhall have the like reward and allowance of 40*l.* and alſo all other advantages which are given to perſons who ſhall apprehend and convict any the like offenders; and ſhall alſo have the king's pardon for all burglaries, robberies, and felonies (except murder and treaſon) by him committed before ſuch diſcovery made; which pardon ſhall be likewiſe a good bar to an appeal. 5 *An. c.* 31. *ſ.* 4.

40l. and a pardon, for convicting two accomplices.

7. And the ſheriff, on producing the certificates, and receipts for the ſaid rewards, may deduct the ſame on his accounts; and if he have not money in his hands, he ſhall be repaid out of the treaſury, on certificate from the clerk of the pipe. 5 *An. c.* 31. *ſ.* 3.

Sheriff how to be repaid.

Or inſtead of charging the ſame in his accounts, he may immediately apply to the commiſſioners of the treaſury, who ſhall forthwith repay the ſame without fee. 3 *G. c.* 15. *ſ.* 4.

Burning.

1. *Maliciouſly and voluntarily burning the houſe of another, by night or by day, is felony at the common law.* 1 Haw 105.

Houſeburning at the common law.

Maliciouſly and voluntarily] For if it be done by miſchance, or negligence, it is no felony. 3 *Inſt.* 67.

Yet if a man maliciouſly intending only to burn one perſon's houſe, happens thereby to burn the houſe of another, it is certain that he may be indicted as having maliciouſly burned the houſe of that other; for where a felonious deſign againſt one man miſſeth its aim, and takes effect upon another, it ſhall have the like conſtruction as if it had been levelled againſt him who ſuffers by it. 1 *Haw.* 106.

Burning] Neither a bare intention to burn a houſe, nor even an actual attempt to do it by putting fire to a part of a houſe, will amount to felony, if no part of it be burned; but if any part of the houſe be burnt, the offender is guilty of felony, notwithſtanding the fire afterwards be put out, or go out of it ſelf. 1 *Haw.* 106.

The houſe] Not only a manſion houſe, and the principal parts thereof, but alſo any other houſe, and the out-buildings, as barns, and ſtables adjoining thereto; and alſo barns full of corn, whether they be adjoining to any houſe or not, are ſo far ſecured by law, that the malicious burning of them is felony at common law. 1 *Haw.* 105.

Of another] A perſon ſeiſed in fee, or but poſſeſſed for years, of a houſe ſtanding by itſelf at a diſtance from all others, cannot commit felony in burning the ſame. Alſo it ſeems the much ſtronger opinion, that a man ſo ſeiſed or poſſeſſed of a houſe in a town, who burns his own with an intent to burn his neighbour's, but in the event burns his own only, is not guilty of felony: but however it is certainly an offence highly puniſhable, in regard of the malice thereof, and the great danger to the publick which at-

tends it; and the offender may be ſeverely fined, and impriſoned during the king's pleaſure, and ſet on the pillory, and bound to his good behaviour during life. 1 *Haw.* 106.

By ſtatute: Burning a dwelling houſe or corn barn.

2. By the ſtatutes of 23 *H.* 8. *c.* 1. and 25 *H.* 8. *c.* 3. No perſon who ſhall be found guilty for wilful burning of any dwelling houſe, or barn wherein any corn ſhall be, nor perſons abetting, procuring, helping, maintaining, or counſelling the ſame, ſhall be admitted to the benefit of clergy.

There hath been much learned debate, how far theſe ſtatutes, which are repealed by 1 *Ed.* 6. *c.* 12. are revived by 5 & 6 *Ed.* 6. *c.* 10. But as the ſame is enacted in effect by other ſubſequent ſtatutes, it is now not very material.

By the 4 & 5 *P.* & *M.* *c.* 4. Every perſon who ſhall maliciouſly command, hire, or counſel any perſon, wilfully to burn any dwelling houſe, or any part thereof, or any barn then having corn or grain in the ſame, ſhall not have the benefit of his clergy.

But acceſſaries after ſhall have their clergy. 1 *H. H.* 573.

Burning a barn or ſtack of corn, in the northern counties.

3. Whoever ſhall wilfully and of malice burn, or cauſe to be burned, or aid, procure, or conſent to the burning of any barn, or ſtack of corn or grain, within any of the counties of *Cumberland*, *Northumberland*, *Weſtmorland*, and *Dureſme*, ſhall be guilty of felony without benefit of clergy. And juſtices of the peace in ſeſſions may hear and determine the ſame. 43 *El.* *c.* 13.

Burning in the night ſtacks of corn or hay, barns, houſes, kilns.

4. If any perſon ſhall in the night time maliciouſly, unlawfully, and willingly burn, or cauſe to be burned or deſtroyed, any ricks or ſtacks of corn, hay, or grain, barns, or other houſes or buildings, or kilns; he ſhall be guilty of felony, but without corruption of blood, or diſinheritance of heirs:

And the judges of aſſize, or three juſtices of the peace (1 *Q.*) may determine the ſame, ſo that the proſecution be within ſix months:

And the ſaid juſtices, on requeſt of the party injured, ſhall iſſue their warrant for apprehending all ſuch perſons as ſhall be ſuſpected thereof, and take their examination:

And ſhall cauſe all others who to them ſhall ſeem likely to make diſcovery, to appear before them, and give information on oath; yet ſo, as no perſon to be examined ſhall be proceeded againſt for any offence, concerning which he ſhall be examined as a witneſs, and ſhall upon his examination make a true diſcovery:

And if ſuch witneſs, being duly ſummoned, ſhall refuſe to appear, or to be examined, they may commit him to the common gaol, till he ſubmit to be examined upon oath:

And they ſhall iſſue warrants for ſummoning jurors:

And if any perſon, being found guilty (in order to avoid judgment of death, or execution thereupon) ſhall make his election to be tranſported, the court ſhall cauſe judgment to be entred that he be tranſported to ſome of the plantations (to be mentioned in the judgment) for ſeven years; and if he ſhall return before the expiration of the term, he ſhall ſuffer death as a felon, and as if no ſuch election to be tranſported had been made by him. 22 & 23 *C.* 2. *c.* 7.

5. By the 9 *G. c.* 22. commonly called the Black act, (which is inserted more at length under the title *Black* act;) If any person shall set fire to any house, barn, or outhouse, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood; [And by the 10 *G.* 2. *c.* 32. *s.* 6. If any person shall wilfully and maliciously set on fire any mine, pit, or delph of coal or cannel coal; which offence, by *s.* 4 of this act, is incorporated with the offences in the Blact act] he shall be guilty of felony without benefit of clergy. Burning by the Black act.

And the hundred shall be chargeable, as in cases of robbery, for the damages sustained (not exceeding 200 *l.*)

And if any person shall apprehend, or cause to be convicted, any offender, and shall be killed, or wounded so as to lose an eye or the use of a limb in endeavouring to apprehend him; on proof thereof made at the sessions, and on certificate thereof from thence, he shall be intitled to the sum of 50 *l.* to be paid by the sheriff in 30 days, the same to be repaid to him out of the treasury.

Which said acts are temporary; and by the last continuance, are to be in force till *Sep.* 1. 1757 &c.

And by the 20 *G.* 2. *c.* 52. All offences of setting fire to any house, barn, or outhouse, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood, are excepted out of the general pardon.

6. Such as be taken for houseburning feloniously done, are not bailable by justices of the peace. 3 *Ed.* 1. *c.* 15. 2 *Inst.* 189. Houseburning not bailable.

7. If any ship officer shall wilfully burn the ship to which he belongeth, or procure the same to be done, to the prejudice of the owner of the ship or goods, he shall be guilty of felony without benefit of clergy. 1 *An. st.* 2. *c.* 9. Burning a ship.

And by the articles of the navy, 22 *G.* 2. *c.* 33. Every person who shall unlawfully burn or set fire to any magazine, or store of powder, or ship, boat, ketch, hoy, or vessel, or tackle or furniture thereunto belonging, not appertaining to an enemy or rebel, shall be punished with death, by the sentence of a court martial. *Art.* 25.

8. If any person shall, by day or by night, in a riotous, open, tumultuous, or in a secret and clandestine manner, forcibly, or wrongfully and maliciously burn any wood, or springs of wood, or coppice wood, he shall be guilty of felony. 1 *G. st.* 2. *c.* 48. 6 *G. c.* 16. Burning wood growing.

And any two justices, or the justices in sessions, may cause the offender to be apprehended, and hear, and determine, and adjudge the offence. 6 *G. c.* 16.

But if the offender is not known, then the person injured shall have satisfaction from the inhabitants of the parishes, towns, or places joining thereon, in the same manner as for dikes and hedges overthrown in the night, by the statute of 13 *Ed.* 1. *c.* 46. (which enacts, that if it cannot be known by the verdict of assize or jury who did the fact, the towns near adjoining shall be distrained to levy the hedge at their own cost, and to yield damages) unless the offender be by such parish, town, or place, convicted in six months. 6 *G. c.* 16.

Burning ling, goſs, furze, or fern.

9. No perſon ſhall on any mountains, hills, heaths, moors, foreſts, chaſes, or other waſtes, burn between *Feb.* 2. and *June* 24. any grig, ling, heath, furze, goſs, or fern; on pain of being committed to the houſe of correction for any time not exceeding one month, nor leſs than ten days, there to be whipt and kept to hard labour. 4 & 5 *W. c.* 23. *ſ.* 11.

Burning goſs, furze, or fern in foreſts.

10. If any perſon ſhall ſet fire to, burn, or deſtroy any goſs, furze, or fern, in any foreſt or chaſe, without conſent of the owner or perſon chiefly intruſted with the cuſtody of ſuch foreſt, or chaſe, or of ſome part thereof, or ſhall be aiding therein, and being brought before a juſtice, ſhall be thereof convicted by confeſſion or oath of one witneſs, or on view of the juſtice, he ſhall forfeit not exceeding 5 *l.* nor leſs than 40 *s.* half to the informer, and half to the poor; if not forthwith paid, to be levied by diſtreſs; and if no ſufficient diſtreſs can be found, the juſtice ſhall commit him to the common gaol for any time not exceeding three months, nor leſs than one month. 28 *G.* 2. *c.* 19. *ſ.* 3.

Burning a laden cart, or fire wood.

11. If any perſon ſhall maliciouſly, willingly, and unlawfully, burn or cauſe to be burnt, any wain or cart laden with coals, or with any goods or merchandizes; or any heap of wood prepared, cut, or felled for making coals, billets, or talwood, he ſhall forfeit treble damages to the party grieved, to be recovered by action of treſpaſs; and alſo 10 *l.* as a fine to the king. 37 *H.* 8. *c.* 6. *ſ.* 4.

Puniſhment of a ſervant careleſly firing a houſe.

12. If any ſervant, thro' negligence or careleſſneſs, ſhall fire or cauſe to be fired any dwelling houſe, or out-houſe or houſes, and be thereof convicted on the oath of one witneſs before two juſtices, he ſhall forfeit 100 *l.* to the churchwardens of the pariſh where the fire ſhall happen, to be diſtributed by them to the ſufferers, in ſuch proportions as to them ſhall ſeem juſt; and if he do not pay the ſame immediately on demand of the churchwardens, the ſaid juſtices ſhall commit him to ſome workhouſe or houſe of correction for eighteen months, there to be kept to hard labour. 6 *An. c.* 31

Threatning to burn a houſe.

13. By the commiſſion of the peace, any juſtice may cauſe to come before him, all thoſe who to any of the people concerning the firing of their houſes have uſed threats, to find ſufficient ſecurity for the peace or their good behaviour towards the king and his people; and if they ſhall refuſe to find ſuch ſecurity, may cauſe them to be ſafely kept in the king's priſons, until they ſhall find ſuch ſecurity.

Burying in woollen. See Woollen Manufacture.

Butchers.

1. NO perſon, uſing the trade of a butcher, ſhall ſell, offer, or expoſe to ſale, by himſelf or any other, any fat oxen, ſteers, runts, kine, heifers, calves, ſheep, or lambs alive; on pain of forfeiting double value, half to the king, and half to him that will ſue. 15 *C.* 2. *c.* 8. Not to ſell fat cattle alive.

2. If any butchers ſhall conſpire not to ſell their victuals but at certain prices; every ſuch perſon ſhall forfeit for the firſt offence 10 *l.* to the king, and if not paid in ſix days, he ſhall ſuffer twenty days impriſonment, and ſhall only have bread and water for his ſuſtenance; for the ſecond offence 20 *l.* in like manner, or the pillory; and for the third offence 40 *l.* or pillory, and the loſs of an ear, and to be taken as a man infamous, and not to be credited in any matter of judgment. And the ſeſſions or leet may determine the ſame. 2 & 3 *Ed.* 6. *c.* 15. Conſpiring to raiſe the price of victuals.

3. No butcher ſhall ſlay any beaſt within any walled town, except *Carliſle* and *Berwick*; on pain of forfeiting for every ox 12 *d.* every cow and other beaſt 8 *d.* half to the king, and half to him that will ſue. 4 *H.* 7. *c.* 3. Not to kill in a walled town.

4. A butcher that ſelleth ſwine's fleſh meazled, or fleſh dead of the murrain, ſhall for the firſt time be grievouſly amerced, the ſecond time ſuffer judgment of the pillory, the third time be impriſoned and make fine, and the fourth time forſwear the town. Ordinance for bakers. *Hawk. Stat. V.* 1. *p.* 181. Selling unwholſome fleſh.

5. If any butcher ſhall kill or ſell any victual on the lord's day, he ſhall forfeit 6 *s.* 8 *d.* one third to the informer, and two thirds to the poor, on conviction before one juſtice, on his own view, or confeſſion, or oath of two witneſſes, to be levied by the conſtable or churchwarden. 3 *C.* *c.* 1. Not to kill or ſell on the lord's day.

6. No butcher ſhall water any hide, except in *June*, *July*, and *Auguſt*; on pain of 3 *s.* 4 *d.* for each offence. 1 *J.* *c.* 22. *ſ.* 2. One third to the king, one third to the informer, and one third to the town or lord of the liberty. *ſ.* 46. Not to water hides.

And the ſeſſions or leet may hear and determine the ſame. *ſ.* 50.

Or, any two juſtices, near the place, may (in three months after the offence committed) ſummon the party accuſed, and the witneſſes; and upon the party's appearance, or contempt in not appearing, on proof of notice given, may examine the witneſſes on oath, and give judgment, and iſſue warrants under their hands to levy the penalty by diſtreſs; and, if not redeemed in ſix days, the ſame to be ſold. They may alſo mitigate the penalties, ſo as they reduce them not to leſs than a fourth part, over and above the coſts and charges. And any perſon aggrieved may appeal to the next ſeſſions, who may finally determine the ſame; and, in caſe of conviction, iſſue warrants for levying the penalties. 9 *An.* *c.* 11. *ſ.* 36.

7. No butcher ſhall put to ſale any hide putrified or rotten; on pain of 3 *s.* 4 *d.* for each offence, in like manner. 1 *J.* *c.* 22. *ſ.* 2. Selling rotten hides.

8. No

Exercising the trade of a tanner.

8. No butcher shall be a tanner or currier; on pain of 6 *s.* 8 *d.* a day, to be recovered and levied in like manner. 1 *J.* *c.* 22. *s.* 2, 25.

Gashing hides.

9. If any raw hide shall wilfully or negligently be gashed, in the flaying thereof; or being gashed, be offered to sale by any butcher or other; the offender shall forfeit 2 *s.* 6 *d.* for such hide, and 1 *s.* for a calf skin; half to the poor, and half to the informer: To be levied by two justices in like manner. 9 *An.* *c.* 11. *s.* 11.

Butter and Cheese.

I. Concerning the packing, weight, and goodness of butter.

II Concerning the licence of a person to buy and sell butter.

III. Concerning ingrossing and regrating of butter and cheese.

IV. Concerning the shipping of butter and cheese for London.

V. Exporting of butter and cheese.

VI. Importing of butter and cheese.

I. Concerning the packing, weight, and goodness of butter.

Weight of the cask to be marked.

1. EVERY farmer and other person packing up butter for sale, shall set upon every firkin and cask, when the same is fully seasoned in water, a continuing visible mark of the just weight of the empty cask; on pain of forfeiting for every offence the sum of ten shillings for every hundred weight of butter otherwise packed, and so proportionably for a greater or lesser quantity; half to the churchwardens and overseers for the use of the poor, and half with double costs to him who shall sue for the same in sessions, by action of debt, indictment, information, or presentment. 13 & 14 *C.* 2. *c.* 26. *s.* 5, 6.

Weight of a pot to be marked.

2. Also every potter shall set upon every pot which he shall sell for packing up butter, the just weight of the pot when it is burnt, together with the first letter of his christian name, and his surname at length; on pain of 1 *s.* And no person shall expose to sale any butter packed up in any pot not so marked, on pain of 2 *s.* for every such pot. To be recovered and applied in like manner. 13 & 14 *C.* 2. *c.* 26. *s.* 6.

3. Every

3. Every kilderkin of butter ſhall contain 112 pounds, and every firkin 56 pounds neat, or above; every pound containing 16 ounces, beſides the tare of the caſk, of good and merchantable butter; and every pot of butter ſhall contain 14 pounds neat, or above, beſides the weight of the pot; Weight and goodneſs.

And no butter which is old or corrupt ſhall be mixed or packed up with any butter which is new and ſound;

Nor any whey butter ſhall be packed or mixed with any butter made of cream;

And every caſk or pot of butter ſhall be of one ſort and goodneſs;

And no butter ſhall be ſalted with any great ſalt, but ſhall be ſalted and ſaved with ſmall ſalt; nor more ſalt ſhall be intermixed with it than ſhall be needful for its preſervation:

On pain that every owner, farmer, or packer of butter, not putting up in each kilderkin, firkin, and pot, to be ſold or expoſed to ſale, ſuch quantities as aforeſaid, or offending in falſe packing as aforeſaid, for every offence ſhall forfeit the value of all the butter ſo falſe packed; and for every offence where any kilderkin, firkin, or pot ſhall be found to contain a leſſer quantity of butter than as above, ſix times the value of every pound of butter that ſhall be wanting in ſuch caſk or pot; to be recovered and applied as aforeſaid. 13 & 14 *C.* 2. *c.* 26. *ſ.* 2.

4. And when the farmer or other perſon hath filled the caſk with butter, he ſhall, beſides the former mark of the weight of the caſk, ſet alſo on the caſk the firſt letter of his chriſtian name, and his ſurname at length with an iron brand; on pain of forfeiting for every offence the ſum of 10*s.* for every hundred weight of butter otherwiſe packed, and for more or leſs proportionably; to be recovered and applied in like manner. 13 & 14 *C.* 2. *c.* 26. *ſ.* 5. Owner to ſet his name on the caſk.

5. And every cheeſemonger and other who ſhall ſell any kilderkin, firkin, pot, or other caſk of butter, ſhall deliver therein the full quantity and due quality; or ſhall be liable to make ſatisfaction, according to the price thereof. 13 & 13 *C.* 2. *c.* 26. *ſ.* 3. Cheeſemonger to deliver due quantity and quality.

6. And no cheeſemonger or other perſon ſhall repack for ſale, any butter, in any kilderkin, firkin, or other caſk, or pot, on pain of forfeiting double value thereof; to be recovered and applied in like manner. 13 & 14 *C.* 2. *c.* 26. *ſ.* 4. Cheeſemonger ſhall not repack butter.

7. The proſecution for the offences above, ſhall be commenced in four months after the ſale of the butter. 13 & 14 *C.* 2. *c.* 26. *ſ.* 7. In what time the proſecution ſhall be.

8. But provided nevertheleſs, that no ſeller of butter ſhall be charged with any of the ſaid penalties, after the buyer hath bought the butter and approved it. 4 *W.* *c.* 7. *ſ.* 2. Proſecution not to be, if the buyer hath approved it.

9. And for preventing any fraud in the ſeller, after the factor or buyer hath bought the butter, the ſaid factor or buyer ſhall ſet his ſeal, or mark, or name upon it, or upon the caſk; and if it ſhall be afterwards exchanged or opened, and the caſk changed, or any bad butter mixed or packed up with good butter, or any other fraud be committed by the ſeller; and he be convicted thereof, before one juſtice, by oath of one witneſs, or confeſſion, Fraud after ſale, by the ſeller.

he

he shall forfeit 20*s.* for every firkin and offence, to be levied by the constable, by distress, and to be distributed by the justice, half to the churchwardens and overseers for the use of the poor, and half to the informer. 4 *W. c.* 7. *s.* 2.

But any person aggrieved may appeal to the sessions, giving 20 *l.* bond to the party, to pay costs (in a month after) if he is not relieved on his appeal. *id. s.* 10.

II. Concerning the licence of a person to buy and sell butter.

Licence.

No badger, lader, kidder, carrier, buyer or transporter of butter and cheese shall be licensed (A) thereunto, unless he be or have been a married man, and be an housholder, and of the age of 30 years or upwards; and unless it be in open sessions of the county, where he hath dwelt for three years last past. 5 *El. c.* 12. *s.* 4.

And the licence to bear date of the day and place of the sessions; and to be signed and sealed by three justices there (1 Q.) *s.* 5.

And the court may take recognizance (B) that he shall not forestall nor ingross, nor do any thing contrary to the statute of 5 & 6 *Ed.* 6. *c.* 14. against regrating, ingrossing, and forestalling. *s.* 6.

The licence and recognizance to be written by the clerk of the peace or his deputy, and by no other person; for which he shall have, for the licence 12 *d.* for the recognizance 8 *d.* and for registring them 4 *d.* For which fee, he shall also enter the names and dwellings of the persons licensed, and a brief declaration of the licence, with the day, time, and place when granted, in a register book, which he shall have at every sessions. *s.* 6.

And the licence to continue but for a year, unless renewed. *s.* 4.

And every person taking any licence contrary hereto, shall forfeit to the king 5 *l.* and the licence to be void: The same to be recovered in sessions, by inquisition, presentment, bill, or information, and by examination of two witnesses. *s.* 5, 7.

But this shall not extend to prejudice the liberty of a city or town corporate, but that they may licence purveyors, for the provision thereof. *s.* 9.

Neither shall it extend to the inhabitants of the counties of *Westmorland*, *Cumberland*, *Lancaster*, *Chester*, and *York*; but that they may do as heretofore they have lawfully used to do. *s.* 10. But by a general clause in the 13 *El. c.* 25. *s.* 20. these counties seem now to be included; by which it is enacted, that no person whatsoever shall be admitted or licensed to be a buyer, badger, kidder, or carrier of butter and cheese, and such like kind of victual, otherwise than by 5 *El. c.* 12.

III. *Con-*

III. Concerning ingrossing and regrating of butter and cheese.

There is nothing relating to the *forestalling* of butter and cheese, different from the forestalling of other goods; which may be seen under the general title of forestalling. But as to ingrossing and regrating the same, it hath been enacted as followeth:

1. By the 3 & 4 *Ed.* 6. *c.* 21. No person shall buy to sell again, any butter or cheese, unless he sell the same again by retail in open shop, fair, or market (or victuallers in their houses), and not in gross; on pain of double value, half to the king, and half to him that will sue. Not to be sold again, but by retail.

And the word *retail* shall be taken only where a weight of cheese (*viz.* 225 pounds, in some places 256, in others 336 pounds, *Dalt. c.* 112.) or a barrel of butter, or less quantity, and not above, shall be sold at any time to any person or persons.

2. And by the 5 & 6 *Ed.* 6. *c.* 14. Whosoever shall ingross or get into his hands any butter or cheese, to sell the same again, shall be deemed an ingrosser. *s.* 3. Ingrossing.

3. But the buying of any butter or cheese, by any licensed badger, lader, kidder, or carrier, who shall sell or deliver in open fair or market, shall not be deemed regrating. 5 & 6 *Ed.* 6. *c.* 14. *s.* 7. Regrating.

4. And nothing in these two acts shall extend to cheesemongers and tallowchandlers in *London* and *Westminster*, for what they shall sell for victualling of ships, or for what they shall sell in their shops or market, not exceeding four weighs of cheese, and four barrels of butter. 21 *J. c.* 22. Cheesemongers in London.

Provided, that if the justices of the peace in any county, in their quarter sessions, shall declare that the said traders in butter and cheese shall forbear to buy any in such county for any time, and they do buy within that time, and sell the same by retail, they shall not have the benefit of this act. *id.*

IV. Concerning the shipping of butter and cheese for London.

1. Every warehousekeeper, weigher, searcher, or shipper of butter and cheese, shall receive all butter and cheese that shall be brought to him, for the *London* cheesemongers, and ship the same without undue preference; and shall have for his pains 2 *s.* 6 *d.* for every load: and if he shall make default, he shall, on conviction before one justice, on oath of one witness, or confession, forfeit for every firkin of butter 10 *s.* and for every weigh of cheese 5 *s.* half to the churchwardens and overseers for the use of the poor, and half to the informer, to be levied by the constable, by distress and sale. 4 *W. c.* 7. *s.* 4. No undue preference.

2. And he shall keep a book of entry of receiving and shipping the goods; on pain of 2 *s.* 6 *d.* for every firkin of butter, and weigh of cheese, to be levied and applied in like manner; and for want of distress, to be committed till paid. 4 *W. c.* 7. *s.* 5. Book of entry.

Master of a ship refusing to take in.

3. A master of a ship refusing to take in butter or cheese, before he is full laden (except it be a cheesemonger's own ship sent for his own goods), shall forfeit for every firkin of butter refused 5 *s.* and for every weigh of cheese 2 *s.* 6 *d.* to be levied and applied in like manner. 4 *W. c.* 7. *s.* 6.

Appeal.

4. Person aggrieved by the determination of the justice, may appeal to the next sessions, giving 20 *l.* bond, with one or more sureties, to the party, to pay costs (within a month after) if he is not relieved on his appeal. 4 *W. c.* 7. *s.* 10.

Exception.

5. But this act shall not extend to any warehouse in *Cheshire* or *Lancashire*. 4 *W. c.* 7. *s.* 9.

V. Exporting of butter and cheese.

Exportation.

Butter and cheese may be exported custom free. 3 *W. c.* 8.

VI. Importing of butter and cheese.

Importation.

No butter or cheese shall be imported from *Ireland*. 32 *C.* 2. *c.* 2.

Note; There are special directions in the act of 8 *G. c.* 27. concerning the selling of butter in the city of *York*, and in the act of the 17 *G.* 2. *c.* 8. concerning the same in *New Malton*; which are not general enough to be here inserted.

A. Licence of a badger of butter and cheese; on the 5 *El. c.* 12.

Westmorland. AT *the general quarter sessions of the peace held at* ——— *in and for the said county, this* ——— *day of* ——— *in the* ——— *year of* ——— *We* A. B. C D. *and* E. F. *esquires, justices of the peace for the said county (one whereof is of the* Quorum) *have licensed, and by these presents do license and admit* B. B. *of* ——— *in the said county, being upwards of thirty years of age, and being also a married man* [or *a widower*], *and an householder, and having been an inhabitant in the said county for three years last past, to be a common badger, huckster, kidder, carrier, buyer and transporter of butter and cheese, for and during the space of one year from the date hereof; so as he do use and follow the said business, according to the true intent and meaning of the statutes in that case made and provided, against regrators, forestallers, and ingrossers, and not otherwise. Given under our hands and seals* &c.

B. *Condition of the recognizance*; on the 5 *El. c.* 12. *s.* 6.

——— *That he shall not forestall, or ingross, or do any thing contrary to the true meaning of the statutes made against regrators, forestallers, and ingrossers, or any thing therein contained.*

Buttons.

1. NO perſon ſhall ſell or offer to ſale, or import, any foreign bone-lace, cut-work, imbroidery, fringe, band ſtrings, buttons, or needle-work, made of thread and ſilk, or either of them, or any foreign buttons whatſoever; on pain that he who ſhall offer them to ſale ſhall forfeit the ſame and 50 *l.* and the importer ſhall forfeit the ſame and 100 *l.* half to the king, and half to him that ſhall ſue. 13 & 14 *C.* 2. *c.* 13. *ſ.* 2. 4 *W.* *c.* 10. *ſ.* 2. Foreign buttons.

And on complaint and information given to a juſtice of the peace, at times reaſonable, he ſhall iſſue his warrant to the conſtable, to enter and ſearch for ſuch manufactures in the ſhops being open, or warehouſes, and dwelling houſes of ſuch perſons as ſhall be ſuſpected, and to ſeize the ſame. 13 & 14 *C.* 2. *c.* 13. *ſ.* 3. 4 *W.* *c.* 10. *ſ.* 2.

And *Engliſh* bone-lace, needlework, point, or cut-work, may be exported cuſtom free. 11 & 12 *W.* *c.* 3. *ſ.* 15.

2. By the 10 *W.* *c.* 2. No perſon ſhall make, ſell, or ſet on, any buttons made of cloth, or made of wood only; on pain of 40 *s.* a dozen, half to the king, and half to him that ſhall ſue in any court of record. Cloth buttons.

And by the 8 *An.* *c.* 6. No taylor or other perſon ſhall make, ſell, ſet on, uſe, or bind on any cloaths, any buttons or button holes, made of or uſed, or bound with ſerge, drugget, frize, camlet, or other ſtuffs of which cloaths are uſually made; on pain of 5 *l.* a dozen, half to the king, and half to him that ſhall ſue in any court of record; or on complaint to two juſtices, they may ſummon witneſſes, and levy the penalty, and return the overplus if any be; and if any perſon is aggrieved, he may appeal to the next ſeſſions.

But by this act no power is given to make diſtreſs. The next that occurs, is the ſtatute of 4 *G.* *c.* 7. which in the ſtatutes at large is a looſe, injudicious, and ungrammatical act, and by its garb may well enough ſeem to have been drawn up by the taylors or button makers; whereby it is enacted as follows:

No taylor or other perſon ſhall make, ſell, ſet on, or bind on any cloaths, any buttons or button holes made of, or uſed, or bound with cloth, ſerge, drugget, frize, camlet, or any ſtuffs that cloaths are uſually made of (velvet excepted); on pain of 40 *s.* a dozen: To be determined by one juſtice where the offence ſhall be diſcovered, or the offender ſhall inhabit, on oath of one witneſs, in three months after the offence committed; and to be diſtributed (charges of conviction firſt deducted) half to the informer, and half to the poor of the pariſh or place where the offence ſhall be diſcovered: if not paid (being lawfully demanded) in 14 days after conviction, the juſtice ſhall iſſue his warrant to the conſtable where the offender dwells, or can be found, to levy it by diſtreſs and ſale; and where no ſufficient diſtreſs can be found, he ſhall be committed to the common gaol of the county or place where he

ſhall

ſhall be found, to be kept to hard labour for three kalendar months. Perſons aggrieved may appeal to the ſeſſions, giving ſufficient notice; and the ſeſſions may allow coſts to the party aggrieved.

And taylors cauſing their apprentices or ſervants to make ſuch cloaths, ſhall themſelves be ſubject to the penalties.

And all ſuch cloaths, made with ſuch buttons and button holes, *expoſed to ſale*, ſhall be forfeited and ſeized, and recovered and diſpoſed of as the other penalties.

And by the ſtatute of the 7 *G. ſt.* 1. *c.* 12. No perſon ſhall *uſe or wear* on any cloaths (velvet excepted) any ſuch buttons or button holes; on pain of 40 *s.* a dozen, on conviction by confeſſion or oath of one witneſs; and any juſtice of the peace, where the offence ſhall be committed, or the offender ſhall inhabit, ſhall on complaint or information on oath, of any credible perſon, in one month after the offence, ſummon the party, and on his appearance or contempt, examine the matter, and on due proof by confeſſion or oath of one witneſs convict the offender, and cauſe the forfeiture by his warrant to be levied by diſtreſs and ſale: the ſaid penalties to be half to him on whoſe oath the party ſhall be convicted, and half to the poor of the pariſh where the offence ſhall be committed. And perſons aggrieved may appeal to the next quarter ſeſſions, giving 8 days notice.

To him on whoſe oath the party ſhall be convicted] This is almoſt the only inſtance where a ſhare of the penalty is given in expreſs words, in a popular action, to the party on whoſe oath any perſon is convicted; and the contrary doctrine ſeems generally to prevail in moſt caſes, that the defendant ſhall not be condemned upon the ſole teſtimony of the plaintiff ſwearing for his own intereſt: And it is certainly againſt the common law, that ſuch a perſon ſhould be a witneſs at all; and therefore his right to give evidence in his own cauſe, and the power to convict the defendant upon that ſole evidence, muſt depend on the expreſs words of ſome ſtatute.

Buying of titles.

I. By the common law.
II. By ſtatute.

I. By the common law.

IT ſeemeth to be an high offence at common law, to buy or ſell any doubtful title to lands known to be diſputed, to the intent that the buyer may carry on the ſuit, which the ſeller doth not think it worth his while to do, and on that conſideration ſells his pretenſions at an under rate; and it ſeemeth not to be material, whether the title ſo ſold be a good or bad one, or whether the ſeller were in poſſeſſion or not, unleſs his poſſeſſion were lawful and uncontested; for all practices of this kind are by all means

means to be discountenanced, as manifestly tending to oppression, by giving opportunities to great men to purchase the disputed titles of others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons, which perhaps they might safely enough maintain against their proper adversary. 1 *Haw.* 261.

II. By statute.

1. By the statute of 13 *Ed.* 1. *c.* 49. *No person of the king's house shall buy any title whilst the thing is in dispute; on pain of both the buyer and seller being punished at the king's pleasure.*

2. And by 32 *H.* 8. *c.* 9. *None shall buy any pretenced right in any land, unless the seller hath taken the profit thereof one year before; on pain that the seller shall forfeit the land, and the buyer the value, half to the king, and half to him that shall sue within one year.* s. 2, 6.

Pretenced title] But he who is in lawful possession may purchase the pretended title of any others. 32 *H.* 8. *c.* 9. *s.* 4.

One year before] But no conveyance made by one who hath the uncontested possession, and undisputed absolute propriety of lands, is any way within the meaning of this statute. 1 *Haw.* 265.

3. *And the offence of buying of titles may be laid in any county, at the pleasure of the informer.* 31 El. c. 5. s. 4.

Callico. See Excise.

Cambrick.

1. CAMBRICKS (so called from being made at *Cambray* in *Flanders*) and *French* lawns may be imported, on the importer's making oath, that they are for exportation only, and that they are really the property of the importer or some other subject, and that no foreigner hath any interest therein, and also giving bond for payment of 5 *l.* for each piece which shall not be exported within three years after entry. 18 *G.* 2. *c.* 36. *s.* 6. Importation.

2. But no person shall *wear* any cambrick or *French* lawn; on pain of 5 *l.* to the informer, on conviction by oath of one witness before one justice, who shall on information on oath in six days after the offence committed, summon the party, and on his appearance or contempt proceed to examine the matter, and on due proof thereof made, either by confession, or oath of one witness, hear and determine the same, and cause the penalty to be levied by distress. The party aggrieved may appeal to the next sessions, giving six days notice. 18 *G.* 2. *c.* 36. *s.* 1. Wearing it.

Selling it.

3. And if any perſon ſhall *ſell* or expoſe to ſale any cambrick or *french* lawns, made or not made up, (except for exportation,) he ſhall forfeit 5 *l.* in like manner. 18 *G.* 2. *c.* 36. *ſ.* 2.

Wearer diſcovering the ſeller.

4. But if the wearer ſhall, on oath before a juſtice, diſcover the ſeller (if ſuch ſale was after *Jun.* 24. 1748.) he ſhall be diſcharged, and the ſeller only ſhall be liable. 18 *G.* 2. *c.* 36. *ſ.* 3. 21 *G.* 2. *c.* 26. *ſ.* 2.

And where ſuch wearer ſhall be excuſed by diſcovering the vender, the penalty on the vender ſhall go to the perſon who informed againſt the wearer. 21 *G.* 2. *c.* 26. *ſ.* 3.

Milliner making up.

5. And any milliner or other perſon who ſhall for hire make up any cambrick or *french* lawn, for any wearing apparel, ſhall be liable to the penalties inflicted on the vender. 21 *G.* 2. *c.* 26. *ſ.* 5.

Huſband liable.

6. And where an offender is a feme covert, living with her huſband, the penalty ſhall be levied on the goods of the huſband. 21 *G.* 2. *c.* 26. *ſ.* 4.

Candles. See Exciſe.
Caplas. See Proceſs.
Cards. See Stamps.

Carriers.

Rates for carriage.

1. BY the 3 *W.* *c.* 12. The juſtices in *Eaſter* ſeſſions yearly, ſhall rate the prices of all land carriage of goods to be brought *into* any place within their juriſdiction, by any common waggoner or carrier; and ſhall certify the rates ſo made to the mayors and other chief officers of the ſeveral market towns within their juriſdiction, to be hung up in ſome publick place to which all perſons may reſort: And no ſuch common waggoner or carrier ſhall take for carriage above the rates ſo ſet, on pain of 5 *l.* by diſtreſs, by warrant of two juſtices where ſuch waggoner or carrier ſhall reſide, to the uſe of the party grieved. *ſ.* 24.

And by 21 *G.* 2. *c.* 18. If any common waggoner or carrier ſhall demand and take any greater price for bringing goods *to London*, or to any place within the bills of mortality than is allowed and ſettled by the juſtices for the place from whence the ſame are brought for the carrying of goods *from London* to the ſaid place; he ſhall forfeit 5 *l.* to the party grieved, to be recovered as by the ſaid act of the 3 *W.* or by diſtreſs and ſale of his goods, by warrant from two juſtices of *Middleſex*, *Surrey*, *London*, or *Weſtminſter*. ſ. 3.

And the clerk of the peace in the country ſhall, immediately after *Eaſter* ſeſſions yearly, certify to the lord mayor of *London*, and to the reſpective clerks of the peace for *Middleſex*, *Surrey*, and *Weſtminſter*, the rates made for the carriage of goods in their

respective counties and places; which certificate, or an attested copy thereof, signed by the officer to whom the same shall be transmitted, shall be sufficient evidence of the prices so set. *s.* 3.

And every common waggoner or carrier shall have his christian and surname and place of abode, in large or capital letters, placed upon some conspicuous part of his carriage, before he shall drive the same; on pain of 20*s.* to be levied and recovered as aforesaid. *s.* 4.

Carrier travelling on sundays.

2. No carrier with any horse or horses, nor waggon-man, carman, or wain-man, with their respective carriages, shall by themselves, or any other, travel on the lord's day; on pain of 20*s.* on conviction in six months, before one justice (or mayor), on view, or confession, or oath of two witnesses, to be levied by the constable or churchwardens by distress; to the use of the poor, except that the justice may reward the informer with any sum not exceeding a third part. 3 *C. c.* 1.

Carrier imbezilling goods.

3. It hath been holden, that a carrier imbezilling goods which he has received to carry to a certain place, is not guilty of felony, because there was not a felonious *taking*; but is liable only to a civil action. 1 *Haw.* 89, 90.

Carrier opening a pack.

4. But it hath been resolved, that if a carrier open a pack, and take out part of the goods, with intent to steal it, he may be guilty of felony; in which case it may be said, not only that such possession of a part distinct from the whole, was gained by wrong, and not delivered by the owner; but also that it was obtained basely, fraudulently, and clandestinely, in hopes to prevent its being discovered at all, or fixed upon any one when discovered. 1 *Haw.* 90.

Carrier stealing goods after brought to the place.

5. Also it seems clear, that if a carrier, after he has brought the goods to the place appointed, take them away again secretly, with intent to steal them, he is guilty of felony; because the possession, which he received from the owner, being determined, his second taking is in all respects the same, as if he were a mere stranger. 1 *Haw.* 90.

Carrying to another place.

6. Also it hath been resolved, that if goods be delivered to a carrier, to be carried to a certain place, and he carries them to another place, and disposeth of them to his own use, that this is felony; because this declareth that his intention originally was not to take the goods, upon the agreement and contract of the party, but only with a design of stealing them. *Kelynge* 82.

Carrier robbed.

7. Where goods are delivered to a carrier, and he is robbed of them, he shall be charged, and answer for them, by reason of the hire: And this was at the common law, before the hundred was answerable over to him; because such robbery might be, by consent and combination, carried on in such a manner, that no proof could be had of it. 1 *Salk.* 143.

How far it is necessary that the carrier should know what the goods are.

8. *H.* 5 *G. Titchburne* and *White.* By *King* Ch. J. If a box is delivered generally to a carrier, and he accepts it; he is answerable, though the party did not tell him there is money in it. But if the carrier asks, and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases the carrier is not liable.

Goods delivered to the carrier's ſervant.

9. A delivery to the carrier's ſervant, is a delivery to the carrier; and if goods are delivered to a carrier's porter, and loſt, an action will lie againſt the carrier. *Read. Car.*

Carrier may indict for goods ſtolen, as his own property.

10. Where goods are ſtolen from a carrier, he may prefer an indictment againſt the felon, as for his own goods; for tho' he has not the abſolute property, yet he has ſuch a poſſeſſory property, that he may maintain an action of treſpaſs againſt any one who takes them from him, and ſo may indict a thief for taking them: and the indictment were good alſo, if it had been brought by the real owner. *Kelynge* 39.

Perſon ſtealing his own goods from the carrier.

11. And there is a ſpecial caſe, wherein it is ſaid, that a man may commit larceny by ſtealing his own goods delivered to the carrier, with intent to make him anſwer for them; for the carrier had a ſpecial kind of property in the goods, in reſpect whereof, if a ſtranger had ſtolen them, he might have been indicted generally as having ſtolen the ſaid carrier's goods, and the injury is altogether as great, and the fraud as baſe, where they are taken away by the very owner. 1 *Haw.* 94.

Caſual death. See Deodand.

Cattle.

So much of this title as concerns butchers in particular, may be ſeen under title Butchers.

I. What number of cattle a man ſhall keep.
II. Concerning the bringing of cattle into England.
III. Buying and ſelling of cattle; and therein of drovers.
IV. Stealing, killing, or maiming of cattle.

I. What number of cattle a man ſhall keep.

What proportion ſhall be obſerved

1. FOR the encouragement of the breeding of cattle, every perſon who ſhall keep above ſixſcore ſheep, above what is for his houſhould, ſhall for every threeſcore ſheep keep one milch cow, and bring up yearly for every ſixſcore ſheep one calf; on pain of forfeiting 20*s.* a month.

And every perſon who ſhall keep above 20 oxen, runts, ſhrubs, ſteers, heifers, or kine, ſhall for every ten of them keep one milch cow yearly, and rear one calf for the ſpace of one year (unleſs it die

die in the mean time) for every ſuch two milch cows; on pain of forfeiting 20*s.* a month:

Theſe penalties to go, half to the king, and half to him who ſhall ſue in the ſeſſions or other court of record. 2 & 3 *P. & M. c.* 3. 7 *J. c.* 8.

2. And for the encouragement of tillage, and to prevent the ingroſſing of farms into a few hands, no man ſhall keep above 2000 ſheep, at ſixſcore to the hundred, over and above what is neceſſary for his houſhold; exceept it be upon his own proper eſtate; on pain of 3*s.* 4*d.* for every ſheep above that number, half to the king, and half to him that ſhall ſue for the ſame in ſeſſions: —— lambs not to be accounted ſheep, till the ſecond midſummer after they are lambed. 25 *H.* 8. *c.* 13. None to have above 2000 ſheep.

II. Concerning the bringing of cattle into England.

1. Not above 600 cattle ſhall be imported from the iſle of *Man* yearly; and to be landed at *Cheſter* and the members thereof only. 18 *C.* 2. *c.* 2. Cattle of the iſle of Man.

2. By the ſixth article of the union, no *Scotch* cattle, carried in *England*, ſhall be liable to any other duties, than thoſe to which the cattle of *England* are liable. 5 *An. c.* 8. Scotch cattle.

3. The importation of cattle from *Ireland*, and other places beyond ſea, ſhall be a common nuſance. 18 *C.* 2. *c.* 2. Iriſh cattle.

And if any ſhall be imported, any perſon may ſeize them, and keep them 48 hours; and if in that time, it be made appear to a juſtice, on the oath of two witneſſes, that they were not imported from *Ireland*, nor from any other place beyond ſea, then they ſhall be delivered on warrant of ſuch juſtice; but in default of ſuch proof and warrant, then to be forfeited. 18 *C.* 2. *c.* 2. 32 *C.* 2. *c.* 2.

And the ſeizor, within ſix days after the conviction and forfeiture, ſhall cauſe them to killed; the hides and tallow he ſhall have himſelf, the reſt ſhall go to the poor, to be diſtributed by the churchwardens and overſeers. 32 *C.* 2. *c.* 2.

And the ſeizors, churchwardens, or overſeers neglecting their duty herein, ſhall forfeit 40*s.* for every one of the great cattle, and 10*s.* for ſheep and ſwine; half to the poor, and half to the informer, by warrant of one juſtice, by diſtreſs; for want of diſtreſs, commitment for three months. 32 *C.* 2. *c.* 2. *ſ.* 6.

And the ſhips bringing the ſame ſhall be forfeited, and any perſon may ſeize and ſell them, half for the poor, and half for himſelf. 20 *C.* 2 *c.* 7.

And a juſtice of the peace may by warrant apprehend the ſeamen, and all others concerned, and commit them to gaol for three months. 20 *C.* 2. *c.* 7.

And if no ſeizure is made in the diſtrict where they are firſt imported, ſuch place ſhall forfeit 100*l.* to the uſe of the houſe of correction. 20 *C.* 2. *c.* 7.

And if the cattle come by colluſion of officers, or otherwiſe, into any other than the firſt diſtrict, they may be ſeized there in like manner. 20 *C.* 2. *c.* 7.

And persons confederating to elude this act, shall incur a *praemunire*. 20 *C.* 2. *c.* 7.

And also, cattle once seized, and afterwards found in another district, may be reseized there. 32 *C.* 2. *c.* 2. *s.* 10.

And *English* cattle intermixed in a drove with *Irish* cattle, may be seized as *Irish* cattle. 32 *C.* 2. *c.* 2. *s.* 11.

III. Buying and selling of cattle; and therein of drovers.

None shall buy and sell in the same market.

1. No person shall buy any ox, steer, ront, cow, heifer, or calf, and sell the same again alive, in the same market or fair; on pain of forfeiting double value, half to the king, and half to him who shall sue. 3 & 4 *Ed.* 6. *c.* 19. 3 *C.* *c.* 4. *s.* 7, 8.

Not to sell again in less than five weeks.

2. And if any person shall buy any ox, ront, steer, cow, heifer, calf, sheep, lamb, goat, or kid living, and sell the same again alive, unless he keep and feed the same for five weeks; he shall forfeit double value, half to the king, and half to him that shall sue in any court of record: And also the justices in sessions may determine the same, by inquisition, presentment, bill, or information, and by examination of two witnesses, and make process thereupon as upon indictment; and make estreats for the king's moiety, and award execution of the other moiety for the complainant, by *fieri facias*, or *capias*, as the courts at *Westminster* may do. 5 & 6 *Ed.* 6. *c.* 14. *s.* 9, 10.

Except drovers.

3. But nevertheless it shall be lawful to any person known for a common drover (being licensed as is hereafter directed) to buy cattle in any such counties, where drovers have been wont in times past accustomably to buy cattle, at their free liberty and pleasure, and to sell the same at reasonable prices, in common fairs and markets, distant from the place where he bought the same 40 miles at the least (so that they be not bought by forestalling). 5 & 6 *Ed.* 6. *c.* 14. *s.* 16, 17.

Drover's licence.

4. And no drover of cattle shall be licensed (A), but in the sessions of the county where he dwells, and hath dwelt for 3 years last past; nor unless he be or have been a married man; and be a housholder, and not a houshold servant or retainer to any person; and of the age of 30 years at the least. 5 *El.* *c.* 12. *s.* 4.

Which licence shall bear date of the day and place where the sessions shall be holden; and shall be signed and sealed by three justices present (1 Q.); on pain that every person who shall take any licence otherwise, shall forfeit 5 *l.* and the licence to be void. *s.* 5.

And the sessions may take bond and surety by recognizance (B), that they shall not forestall or ingross, or do any thing contrary to this act, and the above act of 5 & 6 *Ed.* 6. *c.* 14. *id.* *s* 6.

The licence to be written by the clerk of the peace, for which he shall have 12 *d.* and for the recognizance 8 *d.* and for registring the same 4 *d.* for which said fee, he shall keep a register book of the names and dwelling places of the persons licensed, with an entry

entry of the day, time, and place where the licence was granted; which book he ſhall have at the ſeſſions. *id. ſ.* 6.

And ſuch licence ſhall be only of force for one year. *id. ſ.* 4.

And the juſtices in ſeſſions may hear and determine offences againſt this act, in the ſame manner as againſt the 5 & 6 *Ed.* 6. *c.* 14. in the laſt ſection. *id. ſ.* 8.

But this act ſhall not extend to the inhabitants of the counties of *Weſtmorland*, *Cumberland*, *Lancaſter*, *Cheſter*, and *York*; but that they may do as heretofore they have lawfully uſed to do. *id. ſ.* 10.

But by a general clauſe in the 13 *El. c.* 25. *ſ.* 20. theſe counties ſeem alſo to be included; which enacteth, that no perſon ſhall be licenſed to be a buyer of cattle, otherwiſe than by 5 *El. c.* 12.

5. By the 3 *C. c.* 1. No drover, with any cattle, ſhall travel on the lord's day; on pain of 20*s.* which may be levied by the conſtable or churchwarden, by warrant of one juſtice, on conviction on his view, or by confeſſion, or the oath of two witneſſes; one third to the informer, and two thirds to the poor. Driving on ſundays.

IV. Stealing, killing, or maiming of cattle.

1. By the 22 & 23 *C.* 2. *c.* 7. If any perſon ſhall in the night time maliciouſly, unlawfully, and willingly *kill or deſtroy* any horſes, ſheep, or other cattle, he ſhall be guilty of felony; but without corruption of blood, or loſs of dower: But to avoid judgment of death, or execution thereupon, he may chuſe to be tranſported to ſome of the plantations, to be mentioned in the judgment, for 7 years. Killing or wounding in the night.

And if any perſon ſhall in the night time maliciouſly, unlawfully, and willingly *maim, wound, or otherwiſe hurt* any horſes, ſheep, or other cattle, whereby the ſame ſhall not be killed or utterly deſtroyed; he ſhall forfeit treble damages, by action of treſpaſs, or upon the caſe:

And three juſtices (1 Q.) may inquire by a jury and witneſſes; and may iſſue warrants for ſummoning jurors, and for apprehending perſons ſuſpected, and take their examinations; and cauſe witneſſes to come before them to give information on oath, ſo as no perſon to be examined ſhall be proceeded againſt, for any offence concerning which he is examined as a witneſs, and ſhall make a true diſcovery: and if ſuch witneſs, being ſummoned, refuſe to appear, they may commit him, till he ſubmit to be examined on oath.

2. And by the 14 *G.* 2. *c.* 6. and 15 *G.* 2. *c.* 34. If any perſon ſhall feloniouſly drive away, or in any other manner feloniouſly ſteal any ox, bull, cow, calf, ſteer, bullock, heifer, ſheep, or lamb; or ſhall wilfully kill any ox, bull, cow, calf, ſteer, bullock, heifer, ſheep, or lamb, with a felonious intent to ſteal the whole carcaſs, or any part thereof; or ſhall aſſiſt or aid in committing any ſuch offence, he ſhall be guilty of felony without benefit of clergy. Stealing, or killing with intent to ſteal; 10*l.* reward.

And every perſon, who ſhall apprehend and proſecute to conviction any offender, ſhall have 10 *l.* reward. In order to which, he ſhall have a certificate ſigned by the judge, before the end of the aſſizes, certifying the conviction, and where the offence was committed, and that ſuch offender was apprehended and proſecuted by the perſon claiming the reward; and if there are ſeveral claimants, the judge ſhall in the ſaid certificate direct what ſhare ſhall be paid to each claimant. Which certificate being tendred to the ſheriff, he ſhall within a month pay the ſame without deduction; on pain of forfeiting double, with treble coſts. The ſame to be allowed in his accounts, or to be repaid to him out of the treaſury.

Killing or wounding by the Black act.

3. And by the 9 *G. c.* 22. commonly called the Black act, which is inſerted at large under the title of that name, If any perſon ſhall unlawfully and maliciouſly kill, maim, or wound any cattle, he ſhall be guilty of felony without benefit of clergy; but without corruption of blood.

And the hundred ſhall be anſwerable for the damages, not exceeding 200 *l.*

And if any perſon ſhall apprehend, or cauſe to be convicted, any offender, and ſhall be killed, or wounded ſo as to loſe an eye or the uſe of any limb, in endeavouring to apprehend or ſecure him; on proof thereof at ſeſſions, and on certificate thereof from thence, the ſheriff ſhall within 30 days pay to the perſon intitled the ſum of 50 *l.* to be repaid to him out of the treaſury.

A. A licence for a drover of cattle.

Weſtmorland. AT *the general quarter ſeſſions of the peace held at* ——— *for the county aforeſaid, this* ——— *day of* ——— *We* A. B. C. D. *and* E. F. *eſquires, juſtices of the peace for the ſaid county (one whereof is of the* Quorum) *have licenſed, and by theſe preſents do licenſe and admit* G. H. *of* ——— *in the ſaid county, yeoman, being upwards of* 30 *years of age, and being alſo a married man, and an houſholder, and having been an inhabitant in the ſaid county for three years laſt paſt, to be a common drover of cattle, for and during the ſpace of one whole year from the date hereof; ſo as he do uſe and follow the ſaid buſineſs, according to the laws in that behalf made. Given under our hands and ſeals the day and year firſt abovewritten.*

B. Condition of the recognizance.

——— *That he ſhall not foreſtall, or ingroſs, or do any thing contrary to the true meaning of the ſtatutes made againſt regrators, foreſtallers, and ingroſſers, or any thing therein contained.*

Certiorari.

A Juſtice of the peace may deliver or ſend into the king's bench, an indictment found before him, or a recognizance of the peace taken by him, or a force recorded by him, without any *certiorari*. *Dalt. c.* 195.

What things may be certified without a writ of certiorari.

Concerning which writ of *certiorari*, I will ſhew

I. In what caſes it is grantable.
II. How to be granted and allowed.
III. The effect of it.
IV. The return of it.

I. In what caſes it is grantable.

1. A *certiorari* lies in all judicial proceedings, in which a writ of error does not lie; and it is a conſequence of all inferior juriſdictions erected by act of parliament to have their proceedings returnable in the king's bench. L *Raym* 469, 580.

In caſes where a writ of error lies not.

2. And therefore a *certiorari* lies to juſtices of the peace, even in ſuch caſes which they are impowered by ſtatute finally to hear and determine; and the ſuperintendency of the court of king's bench is not taken away without expreſs words. 2 *Haw.* 286.

Where not ſpecially prohibited by ſtatute.

3. But it ſeems agreed, that a *certiorari* ſhall never be granted to remove an indictment after a conviction, unleſs for ſome ſpecial cauſe; as where the judge below is doubtful what judgment to give. 2 *Haw.* 288.

After conviction.

And, *E.* 18 *G.* 2. *K.* and *Nicells.* An indictment was removed into the court of king's bench by *certiorari*, after conviction, and before judgment. Upon which a doubt aroſe, what the court could do, the *certiorari* being brought before judgment; and this court not being apprized of the circumſtances of the offence, could not tell what judgment to give: and in *Carth.* 6. it is ſaid, they cannot give judgment. A rule therefore was made, to ſhew cauſe why the *certiorari* ſhould not be quaſhed, ſo as to remit it back to the ſeſſions; which was afterwards made abſolute. *Strange* 1227.

4 Alſo, it ſeems a good objection againſt the granting a *certiorari*, that iſſue is joined in the court below, and a *venire* awarded for the trial of it. 2 *Haw.* 288.

After iſſue joined.

5. It hath been adjudged, that wherever a *certiorari* is by law grantable for an indictment, the court is bound of right to award it at the inſtance of the king, becauſe every indictment is the ſuit of the king, and he has a prerogative of ſuing in what court he pleaſes. But it ſeems to be agreed, that it is left to the diſcretion of the court, either to grant or deny it at the prayer of the defendant. 2 *Haw.* 287.

Where the court is bound of right to grant it.

6. And it ſeems that the court will not ordinarily, at the prayer of the defendant, grant a *certiorari* for the removal of an indict-

Not for heinous crimes.

ment

ment of perjury, or forgery, or other heinous misdemeanor; for such crimes deserve all possible discountenance, and the *certiorari* might delay, if not wholly discourage the prosecution. 2 *Haw.* 287.

II. How to be granted and allowed.

How to be granted on indictment or presentment.

1. On *indictment or presentment:* By the 5 *W. c.* 11. and 8 & 9 *W. c.* 33. it is enacted, that *in term time, no writ of* certiorari, *at the prosecution of any party indicted, shall be granted out of the king's bench, to remove any indictment or presentment of trespass or misdemeanor, before trial had, from before the justices in sessions; unless such* certiorari *shall be awarded upon motion of counsel, and by rule of court made for the granting thereof.*

But in the vacation, writs of certiorari *may be granted by any justice of the king's bench, whose name shall be indorsed on the writ, and also the name of the person at whose instance it is granted.*

And all the parties indicted, prosecuting such certiorari, *shall before the allowance thereof, find two sufficient manucaptors, who shall enter into a recognizance before a justice of the king's bench (who shall indorse the same on the writ), or before a justice of the peace of the county or place, in the sum of* 20 l. *with condition, at the return of the writ, to appear and plead to the said indictment or presentment, in the said court of king's bench, and at his own costs and charges to cause and procure the issue that shall be joined thereupon, or any plea relating thereunto, to be tried at the next assizes for the county wherein the indictment or presentment was found, after such* certiorari *shall be returned, or the next term if in* London, Westminster, *or* Middlesex, *unless the court shall appoint another time, and if so, then at such other time; and to give due notice of such trial, to the prosecutor or his clerk in court; and also that the party prosecuting the writ of* certiorari, *shall appear from day to day, in the said court of king's bench, and not depart until he shall be discharged by the court.*

And the said recognizance shall be certified into the king's bench, with the certiorari *and indictment, to be there filed, and the name of the prosecutor (if he shall be the party grieved), or some publick officer, shall be indorsed on the indictment.*

And if the defendant prosecuting the writ of certiorari, *be convicted of the offence for which he was indicted, then the court of king's bench shall give reasonable costs to the prosecutor, to be taxed according to the course of the said court, who shall for the recovery thereof, within ten days after demand and refusal of payment, on oath, have an attachment awarded; and the recognizance not to be discharged till the costs are paid.*

But if the person procuring the certiorari, *being the defendant, shall not, before allowance thereof, procure such manucaptors to be bound as aforesaid, the justices may proceed to the trial of the indictment in sessions, notwithstanding the writ of* certiorari *delivered.*

At the prosecution of any party indicted] This extends only to *certiorari's* procured by persons indicted; from whence it follows, that those which are procured by the prosecutor of an indictment, remain as they were at common law. 2 *Haw.* 292.

To

To be tried at the next assizes] But the recognizance shall not be forfeited, unless the prosecutor give rules according to the course of the court. 2 *Haw.* 293.

Reasonable costs] The master of the crown office, in taxing the costs, ought only to consider those, which are subsequent to the *certiorari*. 2 *Haw.* 292.

May proceed to the trial] Nevertheless they must make a return to the *certiorari*, otherwise they will be in contempt to the court; for all writs must be obeyed, unless good cause be shewn to the contrary; and the proper way of shewing it, is to return it. 2 *Haw.* 292.

How to be granted on an order or conviction.

2. On a *conviction or order:* By the 13 G. 2. *c.* 18. it is enacted, that *no* certiorari *shall be granted, to remove any conviction, judgment, order, or other proceedings, before any justice of the peace, or quarter sessions, unless it be applied for in six kalendar months after such proceedings had or made, and unless it be duly proved upon oath, that the party suing forth the same, hath given six days notice thereof in writing, to the justice or justices, or two of them (if so many there be), before whom such proceedings have been, to the end that such justices, or the parties therein concerned, may shew cause if they so think fit, against the issuing the* certiorari.

And by 5 G. 2. 19. *No such* certiorari *shall be allowed, to remove any such judgment or order, unless the party prosecuting the* certiorari, *before the allowance thereof, enter into a recognizance with sufficient sureties, before a justice of the county or place, or before the justices at sessions where such judgment or order shall have been given or made, or before a justice of the king's bench, in* 50l. *with condition to prosecute the same, at his own costs and charges with effect, without wilful delay, and to pay the party in whose favour the judgment or order was made, within a month after the same shall be confirmed, his full costs to be taxed according to the course of the court where such confirmation shall be. And if he shall not enter into such recognizance, or shall not perform the conditions, the justices may proceed and make such further order for the benefit of the party for whom the judgment shall be given, in such manner as if no* certiorari *had been granted.*

The said recognizance to be certified into the king's bench, and there filed, with the certiorari *and order or judgment removed thereby.*

And if the order or judgment shall be confirmed by the court, the person intitled to the costs, for the recovery thereof, within ten days after demand made, upon oath of such demand and refusal of payment, shall have an attachment granted for the contempt; and the recognizance not to be discharged till the costs are paid and the order complied with.

E. 1 *An.* A rule was made in the court of king's bench, that no *certiorari* should be granted to remove orders of justices, from which the law has given an appeal to the sessions, before the matter be determined on the appeal, because it hinders the privilege of appealing; and that if any order be removed before appeal, it should be sent down again: But if the time of appeal be expired, that

that case is not within the rule: By *Holt* Ch. J.—But afterwards, *M.* 4 *An.* in the case of *Shellington*, it was held, that advantage must be taken of this rule upon the motion to file the order; for that after it is filed, it is too late. 1 *Salk.* 147.

But in the case of the borough of *Warwick*, *M.* 8 *G.* 2. There was an appeal from a poor rate; and the sessions made an order that the churchwardens should produce the books at an adjourned day; before which, a *certiorari* was brought to remove that order: And it was held to lie, though the appeal was depending; else the order must be obeyed before the validity of it can be determined. It was also held, that an appointment of overseers may be removed before an appeal to the sessions; for the rule laid down in 1 *Salk.* 147. extends only to the case where there is a limited time for appealing, as to the *next* quarter sessions; but the statute of the 43 *El. c.* 2. is not so restrained: and consequently it can never be said, that the time for appealing is out. And if the appeal from an appointment is lodged, there can be no *certiorari*, till the sessions hath made a determination; and a *certiorari* brought, pending such appeal, shall be superseded. *Strange* 991.

III. The effect of it.

Subsequent proceedings void.

1. After a *certiorari* is allowed by the inferior court, it makes all the subsequent proceedings on the record that is removed by it erroneous. 2 *Haw.* 293.

Except where the jury is sworn.

2. But it hath been adjudged, that if a *certiorari* for the removal of an indictment before justices of the peace be not delivered, before the jury be sworn for the trial of it, the justices may proceed. 2 *Haw.* 294.

And after judgment.

3. And the justices may set a fine to compleat their judgment, after a *certiorari* delivered. L. *Raym.* 1515.

Removes all after the teste of it.

4. A *certiorari* removes all things done between the teste and return. L. *Raym.* 835, 1305.

Removes the record itself.

5. A *certiorari* removes the record it self out of the inferior court; and therefore if it remove the record against a principal, the accessary cannot there be tried. 2 *Haw.* 325

How far it supersedes the obligation of a recognizance.

6. It hath been holden, that a *certiorari* for the removal of a recognizance for the good behaviour, or an appearance at sessions, will supersede the obligation of it: but this would be highly inconvenient, and the contrary seems to be supported by the better authority. 2 *Haw.* 292.

Case where it is awarded against law.

7. If a *supersedeas* come out of a superior court, to the justices, they ought to surcease, altho' the *supersedeas* be awarded against law; for they are not to dispute the command of a superior court, which is a warrant to them. *Crom.* 129.

IV. The return of it.

Return of the certiorari.

1. Every return of a *certiorari* ought to be under seal. 2 *Haw.* 294.

2. And altho' the *custos rotulorum* keep the records, yet must the justices, to whom it is directed, return the *certiorari*; and therefore

 if

if it is directed to the juſtices of the peace, and the clerk of the peace only return it, nothing is thereby removed. 2 *Haw.* 294.

3. The *certiorari* may be ſometimes to remove and ſend up the record it ſelf, and ſometimes but only the tenor of the record (as the words therein be), and it muſt be obeyed accordingly. *Dalt. c.* 195. 2 *Haw.* 295.

4. A return was in paper, and for that reaſon held not good. 4 *W. K. B. Nelſ.* 178.

5. Upon a *certiorari* to remove an indictment of a riot, or forcible entry, or the like, the return muſt have theſe words, *as alſo to hear and determine divers felonies* &c. according to the commiſſion; for if the return mentions only that they are juſtices of the peace, without ſuch words, the return is inſufficient. *Dalt. c.* 195.

6. If the perſon to whom a *certiorari* is directed, do make a falſe return, yet the court will not ſtay filing it on affidavit of its being falſe, except in publick caſes, as in caſes of commiſſioners of ſewers, or for not repairing highways, or for ſome ſuch ſpecial cauſes; becauſe the remedy for a falſe return is either an action on the caſe at the ſuit of the party grieved, or an information at the ſuit of the king. *Dalt. c.* 195.

7. If the perſon to whom the *certiorari* is directed, do not make a return, then an *alias*, that is, a ſecond writ; then a *pluries*, that is, a third writ, or *cauſam nobis ſignifices*, ſhall be awarded, and then an attachment. *Crom.* 116.

Beſides theſe general rules, in common to all *certioraries*, there are many times ſpecial directions about granting, and allowing or not allowing them, in particular caſes, which are treated of under their reſpective titles; ſuch as highways, game, tithes, ſwearing, and many others.

The return of a *certiorari* may be thus:

Firſt, On the backſide of the writ indorſe theſe or the like words:

The execution of this writ appears in a ſchedule to the ſame writ annexed.

And that ſchedule may be thus, on a piece of parchment by it ſelf, and filed to the writ:

Weſtmorland I *Sir* Philip Muſgrave, *baronet, one of the keepers of the peace and juſtices of our lord the king aſſigned to keep the peace within the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſame county committed, by virtue of this writ to me delivered, do under my ſeal certify unto his majeſty in his court of king's bench, the indictment, of which mention is made in the ſaid writ, together with all matters touching the ſame indictment. In witneſs whereof I the ſaid Sir* P. M. *have to theſe preſents ſet my ſeal. Given at* ——— *in the ſaid county, the* ——— *day of* ——— *in the* ——— *year of the reign of* ———.

Th n

Then take the record of the indictment, and close it within the schedule, and seal and send them up both together with the *certiorari*.

Challenge. See Jurors.
Champerty. See Maintenance.
Chance medley. See Homicide.

Cheat.

1. OF cheats punishable by publick prosecution, there are two kinds; by the common law, and by statute.

2. Those which are punishable at the common law, may in general be described to be deceitful practices, in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment; or by suppressing a will; and such like. 1 *Haw.* 188.

3. It seemeth to be the better opinion, that the deceitful receiving of money from one man, to another's use, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which, common prudence and caution may be a sufficient security. 1 *Haw.* 188.

4. A person for a counterfeit pass, was adjudged to the pillory and fined. *Dalt. c.* 32.

5. On an indictment against the defendant, a miller, for changing corn delivered to him to be ground, and giving bad corn instead of it, it was moved to quash the same, because it is only a private cheat, and not of a publick nature. It was answered, that being a cheat in the way of trade, it concerned the publick, and therefore was indictable. And the court unanimously agreed not to quash it. *T.* 16 *G.* 2. *K.* and *Wood. Sess. C. V.* 1. 217.

6. A person falsly pretending that he had power to discharge soldiers, took money of a soldier to discharge him; and being indicted for the same, the court held the indictment to be good. *T.* 3 *C. Serlistead's case.* 1 *Latch* 202.

7. As there are frauds which may be relieved civilly, and not punished criminally (with the complaints whereof the courts of equity do generally abound); so there are other frauds, which in a special

a ſpecial caſe may not be helped civilly, and yet ſhall be puniſhed criminally: Thus if a minor goes about the town, and pretending to be of age, defrauds many perſons by taking credit for conſiderable quantities of goods, and then inſiſting on his non-age; the perſons injured cannot recover the value of their goods, but they may indict and puniſh him for a common cheat. *Barl.* 100.

8. Offences of this kind by ſtatute, depend upon the 33 *H.* 8. *c.* 1. by which it is enacted, that *if any perſon ſhall falſly and deceitfully obtain, or get into his hands or poſſeſſion, any money, goods, cattels, jewels, or other things, of any perſon, by colour and means of any falſe privy token, or counterfeit letter made in another man's name; and ſhall be convicted thereof, by examination of witneſſes, or confeſſion, at the aſſizes or ſeſſions, or by action in any court of record; he ſhall have ſuch puniſhment by impriſonment, pillory, or other corporal pain (except death) as the court ſhall appoint. Saving to the party grieved ſuch remedy by action or otherwiſe, for the goods ſo obtained, as he might have had by the common law.*

And two juſtices (1 Q.) *may call and convent by proceſs or otherwiſe* (A), *to the aſſizes or ſeſſions, any perſon ſuſpected, and commit or bail him to the next aſſizes or ſeſſions.*

Get into his hands or poſſeſſion) A perſon endeavouring by a counterfeit letter to defraud another of goods, and being apprehended on ſuſpicion of ſuch fraud, before he hath got the goods into his poſſeſſion, ſeems not to be within this ſtatute. *E.* 3 *G.* 2. *K.* and *Brian. Seſſ. C. V.* 2. 27.

Falſe privy token) On motion to quaſh an indictment, which was, that the defendant came pretending that ſuch a perſon had ſent him to receive 20 *l.* and received it, whereas ſuch perſon did not ſend him: By the court, It is not indictable unleſs he came with *falſe tokens*; for we are not to indict one man for making a fool of another. *Black.* 79.

H. 13 *G.* 2. *K.* and *Munoz.* It was adjudged, that an indictment averring the offence to be by falſe tokens, without ſhewing what thoſe falſe tokens are, is not ſufficient; and that the fraudulently procuring a note from a perſon, by falſly affirming that there was one in the next room that would pay the money due upon it, whereas in fact there was no ſuch perſon in the next room, is not a *falſe token*, but a falſe affirmation only. *Seſſ. C. V.* 2. 201. *Strange* 1121.

Note; The ſtatute ſays a falſe *privy* token.

Corporal pain] Lord *Coke* obſerves hereupon, that for this offence the offender cannot be fined, but corporal pain only inflicted. 3 *Inſt.* 133.

But Mr. *Hawkins* obſerves, that there is precedent in *Cro. Car.* 564. by which it appears, that one convicted on ſuch a proſecution hath been adjudged not only to ſtand on the pillory, but alſo to pay a fine of 500 *l.* and to be bound with good ſureties to the good behaviour. 1 *Haw.* 188.

Commit or bail him] In this caſe the juſtices ſhall do well to take examination of the offence, and to certify the ſame to the ſeſſions

or

or gaol delivery, and withal to bind over the informers and witnesses to give evidence therein. *Dalt. c.* 32.

A. Warrant of two justices to apprehend an offender; on 33 *H.* 8. *c.* 1.

Westmorland { To the constable of ———

WHEREAS *complaint hath been made unto us whose names and seals are hereunto set, two of his majesty's justices of the peace for the said county, and one of us of the* quorum, *upon the oaths of* A. I. *of* ——— *yeoman, and* B. I. *of* ——— *yeoman, that on the* ——— *day of* ——— A. O. *of* ——— *yeoman, did by a false privy token* [or, *counterfeit letter*] *that is to say, by* [here particularize the offence] *falsly and deceitfully obtain and get into his hands and possession* [here mention the things] *from* C. I. *of* ——— *contrary to the statute in that case made: These are therefore to command you, upon sight hereof, forthwith to bring the said* A. O. *before us at* ——— *on the* ——— *day of* ——— *to answer to the said complaint, and further to be dealt withal according to law. Given under our hands and seals the* ——— *day of* ———.

Cheese. See Butter.
Chocolate. See Excise.

Church and Church Yard.

Original of the word church.

1. THE ancient Saxon word is *cyrce*, the Danish *kircke*, the Belgick *kercke*, the Cymbrian *kurk*; probably from the Greek word κυριακὸν, belonging to the lord, or κυρίου οἶκος, the lord's house: so that we have lost the ancient pronunciation of the word (except in the northern parts of *England*, and in *Scotland*) by softening the letters *c* or *ch*, as we have done in many cases; which letters the ancient *Greeks* and *Romans* always pronounced hard, as the letter *k*.

Uniting of churches.

2. *In cities and towns corporate, the bishop (with the consent of the mayor, aldermen, and justices of the peace, and of the patron) may unite two churches or chapels: and make order, with the like consent, that the patrons present by turns, having regard to the value of the livings united: and the incumbents thereof shall be graduates.* 17 C. 2. c. 3.

New churches.

3. Clauses are commonly inserted in the several acts of parliament for making provision for the rectors of new churches, which clauses give certain powers to justices of the peace, in relation to the assessments to be made for that purpose.

4. *No*

4. *No fairs nor markets shall be kept in church yards.* 13 Ed. 1. st. 2. c. 6. Markets in the church yard.

5. *Clergymen shall not be arrested, and drawn out of any church or church yard, whilst they attend to divine service; on pain of imprisonment of the offender, and ransom at the king's will, and satisfaction to the party arrested.* 50 Ed. 3. c. 5. 1 R. 2. c. 15. Arrest in the church or church yard.

Also it is said, that arrests in civil cases ought not to be of persons going to or coming from church; but that a warrant from a justice of the peace for the king may be executed in such case. *Cro. Car.* 602. *Cro. Ja.* 321. 2 *Bulstr* 72.

But altho' the officer may be punished for the same either in the spiritual or temporal courts, yet the arrest (if not on a *Sunday)* is good in law. *Watson* 636.

6. *If any person shall, by words only, quarrel, chide, or brawl, in any church or church yard, the bishop (on proof of two witnesses) may suspend every layman, being an offender,* ab ingressu ecclesiæ; *and every clergyman from the ministration of his office, so long as he shall think meet.* 5 & 6 Ed. 6. c. 4. s. 1. Brawling in the church or church yard.

7. *If any shall smite, or lay any violent hands on another in any church or church yard, he shall be deemed* ipso facto *excommunicate, and be excluded from the fellowship and company of* Christ's *congregation.* 5 & 6 Ed. 6. c. 4. s. 2. Striking in the church or church yard.

Lay any violent hands] But churchwardens, or perhaps private persons, who whip boys for playing in the church, or pull of the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of this statute. 1 *Haw.* 139.

Shall be deemed ipso facto *excommunicate*] And he shall not excuse himself by shewing that the other assaulted him. 1 *Haw.* 139.

Ipso facto] Nevertheless, in this and other like cases, there ought either to be a precedent conviction at law, which must be transmitted to the bishop; or else the excommunication must be declared in the spiritual court upon a proper proof of the offence there; for it is implied in every penal law, that no one shall incur the penalty thereof, till he be found guilty upon a lawful trial. 1 *Haw.* 139.

8. *If any shall maliciously strike another with any weapon, in any church or church yard, or shall there draw any weapon with intent to strike, and shall be convicted thereof by verdict of* 12 *men, or confession, or by two witnesses, before the judges of assize, or justices of the peace in their sessions, he shall be adjudged to have one of his ears cut off; and if he have no ears, he shall be burned in the cheek with an hot iron having the letter* F, *whereby he may be known and taken for a froy maker and fighter; and he shall also stand* ipso facto *excommunicate.* 5 & 6 Ed. 6. c. 4. s. 3. Striking with a weapon in the church or church yard.

9. He who steals goods belonging to a parish church, may be indicted for stealing the goods of the parishioners. 1 *Haw.* 94. Sacrilege.

For other matters, see title Churchwardens.

Churchwardens.

I. Who are exempted from being churchwardens.
II. Chusing and swearing of churchwardens, with their duty thereupon.
III. Their duty in levying rates; and therein of vestries, and select vestries.
IV. Their duty as to repairs; and therein concerning church seats.
V. Their duty as to sundry other matters.
VI. Concerning presentments; and therein of sidesmen or assistants.
VII. Their accounting.
VIII. Their punishment on misbehaviour.
IX. Their indemnity on doing their duty.

I. Who are exempted from being churchwardens.

Attorneys.

1. A Counsellor, or attorney, ought not to be chosen churchwarden; and if he is, he may have a prohibition, by reason of his attendance on the courts at *Westminster*. 2 *Roll's Abr.* 272.

Apothecaries.

2. Apothecaries, who have served 7 years, shall be exempted from the office of churchwarden. 6 *W. c.* 4.

Dissenting ministers.

3. Dissenting teachers or preachers, in holy orders or pretended holy orders, being duly qualified, are exempted from the office of churchwarden. 1 *W. Sess.* 1. *c.* 18.

Other dissenters.

4. Other dissenters, scrupling to take upon them the office, may execute the same by a sufficient deputy, to be approved of in like manner as other churchwardens. 1 *W. Sess.* 1. *c.* 18.

Person having convicted a felon.

5. All persons who have prosecuted a felon to conviction, are exempted from the office of churchwarden, in the parish where the offence was committed. 10 & 11 *W. c.* 23. *s.* 2.

II. Chusing and swearing churchwardens; with their duty thereupon.

When to be chosen, and by whom.

1. Churchwardens shall be chosen yearly in *Easter* week, by the joint consent of the minister and parishioners, if it may be; but if they cannot agree, the minister shall chuse one, and the parishioners another. *Can.* 89.

But where there is a custom for the parishioners to chuse both, that custom shall continue. *Cod.* 242.

2. A

2. A perſon choſen churchwarden, refuſing to take his office and oath, may be excommunicated for the refuſal; and no prohibition will lie. *Cod.* 243. Refuſing to take the office.

3. And the eccleſiaſtical judge, refuſing to ſwear him, may be compelled by a *mandamus*. *Cod.* 243. Refuſing to ſwear them.

4. The churchwardens oath, as ſaid to have been agreed on, upon mutual conſultation between the civilians and common lawyers, is as follows; Churchwardens oath.

" You ſhall ſwear truly and faithfully to execute the office of a " churchwarden within your pariſh, and according to the beſt of " your ſkill and knowledge preſent ſuch things and perſons as to " your knowledge are preſentable by the laws eccleſiaſtical of this " realm: So help you god and the contents of this book." *Cod.* 243.

5. Churchwardens being thus ſworn, are ſo far incorporated by law, as to ſue for the goods of the church, and to bring an action of treſpaſs for them; and alſo to purchaſe goods for the uſe of the pariſh; but they are not a corporation in ſuch ſort as to purchaſe lands, or take by grant, except in *London* by cuſtom. *Cod.* 241. Churchwardens a body corporate.

6. Churchwardens ſhall continue in office, till the new churchwardens be ſworn. *Can.* 118. How long they ſhall continue.

III. Their duty in levying rates; and therein of veſtries, and ſelect veſtries.

1. The rates muſt be made with the conſent of the major part of the pariſhioners, houſekeepers, or occupiers of land. In order to which, publick notice of a veſtry (a place ſo called from the veſtments of the miniſter kept there) ought to be given the *Sunday* before, either in the church after divine ſervice is ended, or elſe at the church door as the pariſhioners come out; both of the calling of the ſaid meeting, and alſo of the time and place of the aſſembling of it. And it will be faireſt then alſo to declare for what buſineſs the ſaid meeting is to be held, that no one may be ſurprized, but that all may have full time before, to conſider of what is to be propoſed at the ſaid meeting. And it is uſual that for half an hour before it begins, one of the church bells be tolled to give the pariſhioners notice when they are met. 5 *Co.* 67. *Par. L.* 54. Summoning a veſtry.

2. At the common law, every pariſhioner who paid to the church rates, and no other, had a right to vote. *Par. L.* 56. And thoſe that pay no church rates ſhall have no vote in affairs relating to it, except it be the rector or vicar. *Wood* 155. Who ſhall have a vote in the veſtry.

3. All perſons who have a vote in the veſtry have an equal right, and neither the miniſter nor churchwardens, without a ſpecial cuſtom, can adjourn the veſtry; but this can only be done by a majority of the whole aſſembly. *Strange* 1047. Who may adjourn the veſtry.

4. When the churchwardens and pariſhioners are there met, they are to conſider what ſum of money it will be neceſſary to raiſe for ſuch repairs as ſhall then be needful; and after they have agreed what ſum is fit, they are to make an equal levy. *Degge* 171. Laying the rates.

Majority to bind the parish.

5. And the major part of them that appear, shall bind the parish; or if none appear, the churchwardens alone may make the rate; because they, and not the parishioners, are to be cited and punished, in defect of repairs. *Cod.* 220.

Entring in a book.

6. It is most convenient, that every parish act there be entred in the parish book of accounts, and every man's hand consenting to it be set thereto; for then it will be a certain rule for the churchwardens to go by. *Par. L.* 55.

Select vestry.

7. By custom there may be select vestries, of a certain number of persons elected yearly, to make rates, and manage the concerns of the parish for that year: and such custom is a good custom. *Read. Ch. Service. Cod.* 246. *Strange* 728.

Two rates; one for the fabrick, another for ornaments.

8. It is holden, that a rate for the reparation of the fabrick of a church is real, charging the land, and not the person; but a rate for ornaments is personal, upon the goods, and not upon the land. *Cod.* 220.

And in *Jeffrey*'s case, 5 *Co.* 67. it was solemnly adjudged, that the rates for the repair of the church shall be laid upon every occupier of lands in the parish, altho' such occupier live in another parish; and such person may come to the vestries of the parishioners, and vote in the making a rate: but he shall not be charged towards the ornaments of the church, as for bells, repair of seats, bread and wine, clerk's wages, visitation charges, and the like, by reason of such lands; for that the personal estates of the inhabitants are chargeable with every thing that doth not relate to the fabrick of the church, or repairs of the fences of the church yard, or such other things as concern the freehold.

And therefore some have been of opinion, that churchwardens should make two rates; one upon lands and houses, which may concern the freehold of the church, and another upon personal estates and stock, to defray other expences. But as this method creates confusion, so it is seldom practised.

And Sir *Simon Degge* says, that he conceives the law to be clear otherwise; and that a foreigner who holds lands in the parish is as much obliged to pay towards the bells, seats, and ornaments, as to the repair of the church; otherwise there would be great confusion in making several levies, which he never observed to be practised within his knowledge. But he leaves it a *quæry*, among a diversity of opinions. *p.* 173.

And Mr. *Shaw*, in his parish law, having cited the authors who hold these different opinions says, that the practice generally now goes according to the opinion last mentioned, namely, that foreigners occuping lands within the parish shall be charged to both; and that the ecclesiastical judges, as well as the temporal, for the ease and convenience which accrues from the making of one levy for all, do give countenance hereto, and begin to treat the contrary opinion as obsolete and out of doors. *p.* 92.

Equal pound rate.

9. A taxation by the pound rent is the most equitable way, and not according to the quantity of the land. *Wood* 156.

Tenant to be charged, and not the landlord.

10. Where lands are in farm, not the lessor, but the tenant shall be rated and pay. *Cod.* 221.

11. An

11. An impropriator, tho' bound to repair the chancel, is alſo bound to contribute to the reparations of the church, if he hath lands in the pariſh, which are not parcel of the parſonage. *Cod.* 221, 223. Impropriator how far chargeable.

12. If any perſon find himſelf aggrieved at the inequality of the aſſeſſment, his appeal muſt be to the eccleſiaſtical judge. *Degge* 172. Appeal againſt the rates.

And in ſuch caſe, if he will be relieved, he muſt ſhew, that he is illegally or unequally taxed in reſpect of the quantity of his land, as being rated for more than he has, or that the land which he hath is over rated, or that the rate was needleſs, or that ſome lands in the pariſh are omitted in the rate. *Wood* 155.

13. If any refuſe to pay the rates, being demanded by the churchwardens, they are to be ſued for in the eccleſiaſtical courts, and not elſewhere. *Cod.* 219. *Degge* 171. Rate how to be recovered.

Alſo a quaker, refuſing to pay church rates, may be ſued, as other pariſhioners, in the eccleſiaſtical court; or he may be proſecuted before the juſtices of the peace, in the ſame manner as for his tithes.

IV. Their duty as to repairs; and therein concerning church ſeats.

1. Of common right, the ſoil and freehold of the church is the parſon's; the uſe of the body of the church, and the repair of it, common to the pariſhioners; and the diſpoſing of the ſeats therein, the right of the ordinary. *Cod.* 221. Who ſhall repair.

2. The ſpiritual court may compel the pariſhioners to repair the body of the church, and may excommunicate every one of them till it be repaired; but thoſe that are willing to contribute ſhall be abſolved, till the greater part agree to a tax. *Read. Ch. Service.* Who may compel the repairs to be made.

3. If the churchwardens erect or add any thing new, either to the fabrick of the church, utenſils, or church yard, they muſt have the conſent of the pariſhioners; and if ſuch additions are in the church, the biſhop's licence is alſo neceſſary. But where neceſſary repairs are wanting, the greater part of the pariſh will bind the leſs; and if the major part will not conſent, where repairs are neceſſary, the churchwardens may repair without their conſent, if upon notice given they refuſe to meet, or when they are met, refuſe to make a rate. But if a church fall down, the pariſhioners are not bound to rebuild it. *Read. Ch. Service.* 1 *Ventr.* 367. Difference between adding ſomething new, and repairing the old.

4. But if a church be ſo much out of repair, that it is neceſſary to pull it down, or ſo little, that it needs to be enlarged, the major part of the pariſhioners may make a rate for new building, or inlarging, as there ſhall be occaſion. This was declared in the 29 C. 2. by all the three courts ſucceſſively; notwithſtanding the cauſe was laboured by a great number of quakers, who oppoſed the rate. *Cod.* 221. Majority may rebuild.

5. The parſon, that is, the ſpiritual rector, as alſo the lay impropriator, are bound by common right to repair the chancel, and Repairing the chancel.

is thereupon intitled to the chief ſeat therein, unleſs another hath it by preſcription; yet he hath not the diſpoſal of the ſeats therein, but the b ſhop. *Cod.* 223, 224.

Repairing an ile. 6. An ile in a church, which hath time out of mind belonged to a particular houſe, and been maintained and repaired by the owner of that houſe, is part of his frank tenement, and the ordinary cannot diſpoſe of it, or intermeddle in it. *Cod.* 221.

Seat inſeparable from the houſe. 7. A ſeat, or priority in a ſeat, in the body of the church, may be preſcribed for as belonging to a houſe, if it hath been uſed, and alſo repaired, time out of mind, by the inhabitants of ſuch houſe. *Cod.* 221.

And no one can claim a ſeat in a church by preſcription, as appendant or belonging to land; but it muſt be laid as belonging to a houſe, in reſpect of the inhabitancy thereof. *Wood* 153.

And therefore a ſeat may not be granted to a perſon and his heirs abſolutely; for the ſeat doth not belong to the perſon, but to the inhabitant. *Cod.* 221.

V. Their duty as to ſundry other matters.

Overſeer. 1. Every churchwarden is an overſeer of the poor, altho' every overſeer of the poor is not a churchwarden. 43 *El. c.* 2. *ſ.* 1.

And in *M.* 15 *C.* 2. A churchwarden was committed by the two next juſtices, as churchwarden, for refuſing to account for the money received and diſburſed by him; but on an *habeas corpus* he was diſcharged: becauſe by the warrant of commitment it ought to appear that he was overſeer of the poor, for by the ſtatute of 43 *El.* that is annexed to his office of churchwarden, and the juſtices have no juriſdiction over him as churchwarden, but as overſeer. *Dalt.* 186.

Church way. 2. They are to ſee that the church ways be well kept and repaired. And the right to a church way may be claimed and maintained by a libel in the ſpiritual court. 2 *Roll's Abr.* 287.

Vacancy. 3. Churchwardens have the care of a benefice during its vacancy: Having firſt taken out a ſequeſtration from the ſpiritual court, they are to manage all the profits and expences of the benefice for him that ſhall next ſucceed; plow and ſow his glebe; take in the crop; collect tithes; threſh out and ſell corn; repair houſes and fences, and the like. And they ſhall take care that during the vacancy the church ſhall be duly ſerved by a curate approved by the biſhop, whom they are to pay out of the profits of the benefice. And if the ſucceſſor thinks himſelf aggrieved by them, he may appeal to the eccleſiaſtical judge. *Par. L.* 99. *Comp. Par. Off.* 90.

Worldly calling on the lord's day. 4. They (or the conſtable) ſhall levy the penalties for perſons exerciſing their wordly calling on the lord's day. 29 *C.* 2. *c.* 7.

Profanation of the church. 5. They ſhall ſuffer no plays, feaſts, banquets, ſuppers, church ales, drinkings, temporal courts or leets, lay juries, muſters, or any profane uſage to be kept in the church or church yard. *Can.* 88.

6. They

6. They ſhall ſee that the pariſhioners reſort to church, and continue there orderly, during divine ſervice; and ſhall preſent the defaulters. *Can.* 90. Attending divine ſervice.

7. They ſhall not ſuffer any idle perſons to abide either in the church yard, or church porch, during the time of divine ſervice or preaching; but ſhall cauſe them to come in, or to depart. *Can.* 19. Loitering in the church yard.

8. They ſhall levy the forfeiture of 12*d.* a *Sunday*, on the goods of perſons not coming to church. 1 *El. c.* 2. Levying 12 d. a ſunday for not coming to church.

9. They (or the conſtable) ſhall levy the penalty of 3 *s.* 4 *d.* for uſing unlawful paſtimes on the lord's day. 1 *C. c.* 1. Sports on the lord's day.

10. They (or the conſtables or overſeers) ſhall levy the penalties for being preſent at unlawful conventicles. 22 *C.* 2. *c.* 1. Conventicle.

11. They ſhall, on pain of 20*l.* preſent at the ſeſſions once a year, the monthly abſence from church of all recuſants, and the names and ages of their children above nine years old, and the names of their ſervants. And if the party preſented ſhall be indicted and convicted, the churchwarden ſhall have a reward of 40*s.* to be levied of the recuſant's goods, by warrant of the juſtices in ſeſſions. 3 *J. c.* 4. Recuſants.

12. They ſhall keep excommunicated perſons out of the church. *Can.* 85. Excommunicate perſons.

13. They ſhall take care to have in the church a large bible, book of common prayer, book of homilies, a font of ſtone, a decent communion table, with proper coverings, the ten commandments ſet up at the eaſt end, and other choſen ſentences upon the walls, a reading deſk, and pulpit, and cheſt for alms; all at the charge of the pariſh. *Can.* 80, 81, 82, 83, 84. Ornaments of the church.

14. They ought to keep the keys of the belfrey, and to take care that the bells be not rung without good cauſe, to be allowed by the miniſter and themſelves. *Can.* 88. Bells.

15. They ſhall have a box, wherein to keep the regiſter, with three locks and keys, two keys to be kept by them, and one by the miniſter; and every *Sunday* they ſhall ſee that the miniſter enter therein all chriſtnings, weddings, and burials that have been the week before; and at the bottom of every page, they ſhall (with the miniſter) ſubſcribe their names. And they ſhall, within a month after *March* 25. yearly, tranſmit to the biſhop a copy thereof for the year before, ſubſcribed as above. Regiſter.

And ſuch regiſter, being carefully preſerved, is good evidence; and the falſifying of it is puniſhable at the common law. *Cod.* 229.

16. They ſhall, at the charge of the pariſh, with the advice and direction of the miniſter, provide bread and wine againſt the communion. *Can.* 20. Communion.

17. They (or the overſeers) ſhall levy the penalty of 5*l.* for an incumbent not reading the common prayer once a month. 13 & 14 *C.* 2. *c.* 4. Incumbent.

18. They ſhall collect money on charity briefs, on pain of 20*l.* 4 *An. c.* 14. Charity briefs.

19. They ſhall not ſuffer any ſtrangers to preach, but ſuch as ſhall appear qualified on ſhewing their licence; and they ſhall ſee Strange preachers.

that ſuch preachers regiſter or ſubſcribe their names in a book to be kept for that purpoſe, with the day when they preached, and the biſhop's name who granted the licence. *Can.* 50, 52.

Burying in woollen.

20. They ſhall, on certificate from the miniſter, apply to the magiſtrates, for conviction of offenders in not burying in woollen. 30 *G.* 2. *c.* 3.

Perſons denied chriſtian burial.

21. Perſons who murder themſelves, or die excommunicated, are denied chriſtian burial; and therefore the churchwardens are not to ſuffer them to be buried in the church or church yard, without ſpecial licence from the biſhop. *Degge* 183.

Eating fleſh on fiſh days.

22. They ſhall levy the penalties for eating fleſh on fiſh days. 5 *El.* *c.* 5.

Unlicenſed alehouſe.

23. They (or the conſtable) ſhall levy the penalty for keeping an unlicenſed alehouſe. 3 *C.* *c.* 3.

Drunkenneſs.

24. They ſhall receive the penalties for tipling and drunkenneſs. 4 *J.* *c.* 5. 21 *J.* *c.* 7.

Suffering tipling.

25. They (or the conſtable) ſhall levy the penalty for ſuffering tipling. 1 *J.* *c.* 9.

Spirituous liquors.

26. They ſhall receive the penalties for hawking ſpirituous liquors. 9 *G.* 2. *c.* 23.

Corn.

27. They (or the overſeers) ſhall levy the penalty for ſelling corn by a wrong meaſure. 22 *C.* 2. *c.* 8.

Butter and cheeſe.

28. They (or the overſeers) ſhall receive the penalties relating to butter and cheeſe. 13 & 14 *C.* 2. *c.* 26.

Foreign cattle.

29. They, and the overſeers, ſhall diſtribute amongſt the poor foreign cattle imported, forfeited, and killed. 32 *C.* 2. *c.* 2.

Weights and meaſures.

30. They (or the overſeers) ſhall levy the penalties relating to weights and meaſures. 16 *C.* *c.* 19. 22 *C.* 2. *c.* 8.

Hawkers and pedlars.

31. They ſhall carry hawkers and pedlars trading without licence, before a juſtice of the peace. 9 & 10 *W.* *c.* 27.

County rate.

32. They (or the overſeers) ſhall pay to the high conſtables the general county rate, out of their money collected for the poor. 12 *G.* 2. *c.* 29.

Servants firing houſes.

33. They ſhall receive the penalty for ſervants careleſly firing houſes. 6 *An.* *c.* 31.

Tracing hares.

34. They ſhall receive the penalties for tracing hares in the ſnow (and other game penalties). 1 *J.* *c.* 27.

Surveyors of the highways.

35. They ſhall join with the conſtable and ſurveyor of the highways in chuſing and returning new ſurveyors. 3 *W.* *c.* 12.

VI. Of preſentments; and therein concerning ſideſmen or aſſiſtants.

Oath to preſent.

1. Churchwardens by their oath are to preſent or certify to the biſhop, or his officer, all things preſentable by the eccleſiaſtical laws, which relate to the church, miniſter, and pariſhioners.

Book of articles.

2. The articles delivered to them for their direction, are for the moſt part founded on the book of canons made in the year 1603, and the rubricks of the common prayer.

Statute preſentments.

3. There are alſo ſeveral things which they are bound to preſent by act of parliament; as tipling or drunkenneſs by the ſtatute of 4 *J.* *c.* 5. recuſants by 3 *J.* *c.* 4.

4. They

4. They may present as often as they please, but shall not be obliged above once a year where it hath so been used, and not above twice any where, except it be at the bishop's visitation. *Can.* 116, 117. When to present.

5. For the presentments of any church or chapel for one year, the register shall have only 4*d*. *Can.* 116. Fee for taking-in presentments.

6. The minister may present where the churchwardens neglect. *Can.* 113. But such presentment ought to be upon oath. 2 *Ventr.* 42. Minister may present.

7. In larger parishes, there are officers called sidesmen (anciently synodsmen, otherwise called questmen) to assist the churchwardens in their enquiries and presentment of offenders: They shall be chosen yearly in *Easter* week by the minister and parishioners, if they can agree; if not, by the bishop. *Can.* 90. Sidesmen.

8. The sidesman's oath, said to have been agreed on by the civilians and common lawyers, is this: Sidesman's oath.

" You shall swear, that you will be assistant to the churchwar-
" dens in the execution of their office, so far as by law you are
" bound: So help you god." *Cod.* 242.

9. Whereas churchwardens are sworn, and ministers charged, to present as well crimes and disorders, as also the common fame which is spread abroad of them, whereby they are sometimes troubled by the delinquents or their friends; all judges both ecclesiastical and temporal are (by the 115th canon) admonished and exhorted, as they regard and reverence the fearful judgment seat of the highest judge, that they admit not in any of their courts any suit against churchwardens or ministers for any such presentments; considering that they tend to the restraint of shameless impiety, and that the rules of charity and government do presume that they did nothing therein of malice, but for the discharge of their consciences. Presentment on common fame.

But as common fame is often false, and as it is better that ten offenders should escape than one innocent person suffer, and as the above canon supposes that an action may be brought for such presentment; it seemeth good to use caution in this matter, unless the offence be very notorious.

VII. Their accounting.

1. At the end of the year, or within a month after at most, they shall before the minister and parishioners (at a vestry) give up a just account of such money as they have received, and also what particularly they have bestowed in reparations, and otherwise, for the use of the church; and shall deliver up to the parishioners the money and parish goods in their hands, to be delivered over by them to the next churchwardens by bill indented. *Can.* 89. When to account.

2. And if they refuse, they may be presented at the next visitation by the new churchwardens; or any of the parish that are interested How compelled to account.

interested may by process call them to account before the ordinary; or the succeeding churchwardens may have a writ of account at common law. And if they have disbursed more than they have received, the succeeding churchwardens shall pay what is due to them, and account it among their disbursements. 1 *Roll's Abr.* 121.

Accounting to a select vestry.

3. If the custom of the parish is, for a certain number of persons to have the government thereof, and the account is given up to them; the custom is a good custom, and the account given to them a good account. *Cod.* 242.

Vouchers.

4. Mr. *Barlow* says, that for disbursements of any sum not above 40*s.* their own oath is held sufficient proof; but for all sums above, receipts must be produced. *Barl.* 105. But it may be more satisfactory if receipts be produced for all.

Allowance of the account.

5. The allowance of the account may be by entring it in the church book of accounts, and having it signed by those in the vestry who allow the accounts. *Barl.* 105.

Account allowed, final.

6. When they have faithfully accounted, and their acount is allowed by the minister and major part of the parishioners present, it shall not afterwards be in the power of any to make them account again; unless some fraud in their account is afterwards discovered. *Wood* 157.

E. 7 *G.* 2. *Wainwright* and *Bagshaw.* The churchwardens were cited into the court of *Litchfield* to account. They pleaded, that they had accounted at the vestry according to law. Which plea was rejected; and thereupon a prohibition was granted: for the ordinary is not to take the account, he can only give a judgment that they do account; and to what purpose should they be sent back, to those who have taken their accounts already. *Str.* 974, 1133.

VIII. Their punishment on misbehaviour.

Churchwardens committing waste.

1. If the churchwardens waste the goods of the church, the new churchwardens may call them to an account before the bishop, or bring their action at common law. *Read. Ch. Service.*

Parishioners may be evidence against them.

2. And whereas many churchwardens and overseers, and other persons intrusted to receive collections for the poor, and other publick monies relating to the churches and parishes whereunto they belong, do often mispend the same, to the prejudices of such parishes, and of the poor, and other inhabitants thereof; and the parishioners, who are the only persons sometimes who can make proof thereof, have not been allowed to be witnesses against them: it is enacted, that in all actions to be brought in any court at *Westminster*, or at the assizes, for the recovery thereof, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted. 3 *W. c.* 11. *s.* 12.

Not answerable for indiscretion.

3. But churchwardens are not answerable for indiscretion, but for deceit only, if they lay out more money than is needful. *Wood* 154.

IX. Their indemnity on doing their duty.

If an action be brought against any churchwardens, or persons called sworn men, executing the office of churchwarden, for any thing done by virtue of their office, they may plead the general issue, and give the special matter in evidence; and if a verdict is given for them, or the plaintiff shall be nonsuit, or discontinue, they shall have double costs. 7 *J. c.* 5. 21 *J. c.* 12. Double costs.

In *Kercheval*'s case, *M.* 8 *Car.* An action was brought against the churchwardens for a presentment upon common fame of incontinency. Upon not guilty, it was found for the churchwardens, and moved that they might have double costs: But it was resolved, that this being merely ecclesiastical, is not within this statute; for that the statute was never intended, but where they shall be vexed concerning temporal matters, which they shall do by virtue of their office, and not for presentments concerning matters of fame. *Cro. Car.* 285, 286.

Clergy.

I. Clergymen.
II. Benefit of clergy.

I. Clergymen.

1. BY the 43 *El. c.* 2. Clergymen are liable to the poor rates, for their glebe and tithe. Liable to the poor.

2. And Mr. *Hawkins* says, clergymen are within the purview of the statutes relating to the repair of highways, in respect of their spiritual possessions, as much as any other persons whatsoever in respect of any other possessions; for the words are general, and there is no kind of intimation in the said statutes that any particular persons shall be exempted more than others. 1 *Haw.* 204. And to the highways.

3. And it seems to be now generally settled, that clergymen are liable to all publick charges imposed by act of parliament, where they are not specially excepted. And to other publick charges.

4. No clergyman shall take to farm any lands (except he have not sufficient glebe for the expences of his houshold); on pain of 10 *l.* a month, half to the king, and half to him that shall sue: and the leases or contracts shall be void. 21 *H.* 8. *c.* 13. Shall not farm.

5. No clergyman shall buy to sell again any cattle, corn, fish, wool, wood, victual, or any manner of merchandize; on pain of treble value, half to the king, and half to him that shall sue: and the contract shall be void. 21 *H.* 8. *c.* 13. Shall not buy to sell again.

6. No

Shall not keep a tanhouſe or brewhouſe.

6. No clergyman ſhall keep any tanhouſe, or any brewhouſe but for his own houſe; on pain of 10*l.* a month, half to the king, and half to him that ſhall ſue. 21 *H.* 8. *c.* 13.

May be impriſoned for incontinency.

7. The ordinary may puniſh clergymen for incontinency, by committing them to ward or priſon by his diſcretion. 1 *H.* 7. *c.* 4.

Privilege againſt an aſſault.

8. A perſon, laying violent hands on a clergyman, may be puniſhed in the eccleſiaſtical court. 13 *Ed.* 1. *Circumſpecte agatis.* 9 *Ed.* 3. *ſt.* 1. *c.* 3. 2 *Inſt.* 492.

May have the benefit of clergy more than once.

9. Clergymen in holy orders may have the benefit of clergy a ſecond, or third time, or oftner. 2 *H. H.* 374, 375.

Shall not be burnt in the hand.

10. A clerk in holy orders ſhall not be burned in the hand, but ſhall have the ſame privilege as if he had been burned in the hand; and therefore ſhall not be drawn in queſtion in the eccleſiaſtical court to deprive him, or inflict any eccleſiaſtical cenſure upon him. 2 *H. H.* 389.

Shall not ſerve temporal offices.

11. To the intent that clergymen may the better diſcharge their duty in celebration of divine ſervice, and not be intangled with temporal buſineſs; if any of them be choſen to any temporal office, he may have his writ to be diſcharged. 1 *Inſt.* 96.

Shall not ſerve in war.

12. Eccleſiaſtical perſons have this privilege, that they ought not in perſon to ſerve in war. 2 *Inſt.* 4.

Need not appear at the torn.

13. Eccleſiaſtical perſons are not bound to appear at the torn, or view of frankpledge. 52 *H.* 3. *c.* 10. 9 *Ed.* 2. *c.* 3. 2 *Inſt.* 4.

Shall not be arreſted in the church.

14. No clergyman ſhall be arreſted in any church or church yard, whilſt he attends to divine ſervice; on pain of impriſonment of the offender, and ranſom at the king's will, and gree to the party arreſted. 50 *Ed.* 3. *c.* 5. 1 *R.* 2. *c.* 15.

But the arreſt notwithſtanding (if not on a *Sunday*) is good in law. *Watſon* 636.

Shall not be taken on a ſtatute ſtaple.

15. The body of a clergyman may not be taken by force of any proceſs upon a ſtatute ſtaple, or ſtatute merchant. 2 *Inſt.* 4.

Nor on a capias.

16. If an action of treſpaſs, debt, account, or other action wherein proceſs of *capias* lies, be brought againſt a clerk in holy orders, and the ſheriff return that he is a clergyman beneficed, having no lay fee in which he may be ſummoned, in this caſe the plaintiff cannot have a *capias* to arreſt his body, but a writ to the biſhop to compel him to appear. 13 *Ed.* 1. *c.* 45. 2 *Inſt.* 4. *Degge* 157.

Sheriff ſhall not levy on his eccleſiaſtical goods.

17. If a perſon be bound in recognizance in the chancery, or in any other court, and he pay not the ſum at the day; by the common law, if the perſon had nothing but eccleſiaſtical goods, the recognizee could not have a *levari facias* to the ſheriff to levy the ſame of theſe goods, but the writ ought to be directed to the biſhop to levy the ſame of his eccleſiaſtical goods. 2 *Inſt.* 4.

Shall not be amerced of his ſpiritual goods.

18. A clergyman ſhall be amerced only according to his lay tenement, and not after the quantity of his ſpiritual benefice. *Magn. Chart. c.* 14. *Cod.* 15.

Diſtreſs not to be made on his ſpiritual inheritance.

19 Diſtreſſes ſhall not be taken by ſheriffs, or other of the king's miniſters, in the inheritance of the church, wherewith it was anciently endowed; but otherwiſe it is of late purchaſe. 9 *Ed.* 2. *c.* 9. 2 *Inſt.* 4. *Cod.* 18.

20. A clergyman is not bound to pay tolls or other like cuſtoms, for his eccleſiaſtical goods; and if he be moleſted therefore, he may have a writ for his diſcharge. 2 *Inſt.* 4. *Cod.* 21. Shall not pay toll of his ſpiritual goods.

And this not only for all the goods and merchandizes of clergymen gotten upon their church livings, but alſo for all goods and merchandizes by them bought, to be ſpent upon their rectories and church livings. *Degge* 153.

21. Lord *Coke*, in his readings on the *Magna Charta*, ſays thus; "True it is, that eccleſiaſtical perſons have more and greater "liberties than other of the king's ſubjects, wherein to ſet down "all would take up a whole volume of itſelf, and to ſet down no "example, agreeth not with the office of an expoſitor; therefore "ſome few examples ſhall be expreſſed, and the ſtudious reader "left to obſerve the reſt as he ſhall read them in our books, and "other authorities of law." And the inſtances he gives, are chiefly thoſe which are mentioned above; nevertheleſs I do not find any author ſince his time, who hath ſaid what are thoſe other many and great privileges of the clergy; but the authors do generally adhere to theſe particular inſtances, probably as being ſupported by ſo great an authority: Other privileges have been aboliſhed, ſince his time, by acts of parliament, and the adjudications of the temporal courts; and others perhaps loſt by diſuſe; and poſſibly ſome of the inſtances above mentioned would have been gone likewiſe, or not looked upon as of ſo much authority, if they had not been vouched by Lord *Coke*. Obſervations.

II. Benefit of clergy.

I. Original of the benefit of clergy.
II. By what perſons it may be demanded.
III. In what caſes it may be demanded.
IV. At what time it muſt be demanded.
V. Effect of clergy allowed.

I. Original of the benefit of clergy.

ANciently princes and ſtates, converted to chriſtianity, in favour of the clergy, and for their encouragement in their offices and employments, and that they might not be ſo much intangled in ſuits, did grant to the clergy very bountiful privileges and exemptions; and particularly, an exemption of their perſons from criminal proceedings, in ſome capital caſes before ſecular judges; which was the true original of the benefit of clergy. Original of the benefit of clergy.

The clergy increaſing in wealth, power, honour, number, and intereſt, afterwards ſet up for themſelves; and that which they obtained by the favour of princes and ſtates at firſt, they now began to claim as their right, and a right of the higheſt nature, namely, by the law of god; and by their canons and conſtitutions endeavoured, and in ſome places obtained, vaſt extenſions of theſe exemptions, both with regard to the perſons concerned, to wit, not only

only to perſons in holy orders, but alſo to all that had any kind of ſubordinate miniſtration relative to the church; and likewiſe in reſpect of the cauſes, exempting as far as they could all cauſes of clergymen, as well civil as criminal, from the juriſdiction of the ſecular power, and wholly ſubordinating them immediately and only to the eccleſiaſtical juriſdiction, which they ſuppoſed to be lodged firſt in the pope by divine right and inveſtiture from Chriſt, and from the pope ſhed abroad into all ſubordinate and eccleſiaſtical juriſdiction.

And by this means they endeavoured, and in ſome kingdoms and for ſome ages obtained, that there was a double ſupreme power in every kingdom; the one eccleſiaſtical, abſolute, and independent upon any but the pope, over eccleſiaſtical men and cauſes; and the other ſecular, or the king, or civil magiſtrate.

But this claim of exemption, altho' it obtained much in this kingdom, yet grew ſo burdenſome, that it was from time to time qualified and abridged by the civil power, ſometimes by acts of parliament taking it away in ſome caſes, ſometimes by the interpretation and conſtruction of the judges, and ſometimes by the contrary uſage of the kingdom: for eccleſiaſtical canons never bound in *England*, farther than they were received, and ſo had not their authority from their own ſtrength and obligation, but from the uſages and cuſtoms of the kingdom that admitted them, and only ſo far forth as they were ſo admitted.

And therefore if they were indicted in caſes criminal, but not capital, nor wherein they were to loſe life or limb, there the privilege of clergy was not allowed; and therefore not in indictments of treſpaſs or petit larceny.

Alſo it was not allowed them in high treaſon.

But, at the common law, in all caſes of felony or petit treaſon, clergy was allowable, excepting two, *inſidiatores viarum, & arſon.* 2 *H. H.* 323—330.

Who may demand it.

II. By what perſons it may be demanded.

Others beſides clergymen.

1. By a favourable interpretation of the ſtatutes relating to the benefit of clergy, not only thoſe actually admitted into ſome inferior order of the clergy, but alſo thoſe who were never qualified to be admitted into orders (which was formerly tried by putting them to read a verſe) have been taken to have a right to this privilege, as much as perſons in holy orders. 2 *Haw.* 338.

Women.

2. But by the common law, a woman could not have the benefit of clergy: but now by the ſtatute of 3 *W. c.* 9. a woman convicted or outlawed for any felony, for which a man might have his clergy, ſhall upon praying the benefit of that ſtatute, be ſubject only to ſuch puniſhment as a man would be in the like caſe.

Hereticks, Jews, Turks, perſons excommunicate.

3. A perſon convicted of hereſy, a Jew, or a Turk, ſhall not have their clergy; but a perſon excommunicate ſhall have his clergy. 2 *H. H.* 373.

4. Alſo

4. Alſo every perſon (not being within orders) who hath been once admitted to his clergy, ſhall not be admitted to the ſame a ſecond time. 4 *H.* 7. *c.* 13. Perſons having had clergy once.

5. And if he is convicted of murder, he ſhall be marked (unleſs he is a peer, 2 *H. H.* 376.) with an M, on the brawn of the left thumb; and if for any other felony, with a T. 4 *H.* 7. *c.* 13. Burning in the hand.

6. But he ſhall not be ouſted of his clergy, by the bare mark in his hand, or by a parol averment, without the record teſtifying it, or a tranſcript thereof, according to the following ſtatutes. 2 *H. H.* 373. Burning not a concluſive proof of the conviction.

7. By 34 & 35 *H.* 8. *c.* 14. The clerk of the crown, or of the peace, or of aſſize, ſhall certify a tranſcript briefly of the tenor of the indictment, outlawry, or conviction, and attainder, into the king's bench in 40 days: And the clerk of the crown, when the judges of aſſize, or juſtices of the peace write to him for the names of ſuch perſons, ſhall certify the ſame with the cauſes of the conviction or attainder. Conviction how to be certified.

8. Another method is given by the 3 *W.* *c.* 9. which enacts, that the clerk of the crown, clerk of the peace, or clerk of aſſize, where a perſon admitted to clergy ſhall be convicted, ſhall at the requeſt of the proſecutor, or any other on the king's behalf, certify a tranſcript briefly and in few words, containing the effect and tenor of the indictment and conviction, of his having the benefit of clergy, and the addition of the party, and the certainty of the felony and conviction, to the judges where ſuch perſon ſhall be indicted for any ſubſequent offence. *ſ.* 7. How it may be otherwiſe certified.

9. Alſo it ſeems, that if the party deny that he is the ſame perſon, iſſue muſt be joined upon it, and it muſt be found upon trial that he is the ſame perſon, before he can be ouſted of clergy. 2 *H. H.* 373. How tried whether he is the ſame perſon.

III. In what caſes it may be demanded.

1. By the 25 *Ed.* 3. *ſt.* 3. *c.* 4. All manner of clerks, who ſhall be convicted before the ſecular judges, for any treaſons or felonies, touching other perſons than the king himſelf, ſhall have the privilege of holy church. Formerly allowed in all felonies.

2. Clergy was never allowed in this nation, in caſes of high treaſon, nor is it allowed on indictments of petit larceny or treſpaſs; but by the above recited act, clergy was allowed in all treaſons and felonies, except treaſon againſt the king: So that after this ſtatute, the benefit of clergy might be pleaded and allowed in all other treaſons and felonies. *Hale's Pl.* 230. 2 *H. H.* 326. But not in treaſon or petit larceny.

3. Conſequently, wherever clergy is not allowable in any other caſes, it is taken away by ſome ſubſequent act of parliament. *Hale's Pl.* 230. Clergy taken away by ſtatutes.

4. Conſequently, where a new felony is made by an act of parliament, clergy is to be allowed, unleſs expreſsly taken away by ſuch ſtatute. *Hale's Pl.* 230. Allowed in new felonies, unleſs expreſsly taken away.

And if it maketh a new felony, and takes away clergy not generally, but in ſuch or ſuch caſes, regularly in other caſes, clergy is allowable; as if it take away clergy in caſe the party be convicted

victed by verdict, yet he shall have his clergy, if he stand mute. 2 *H. H.* 335.

But this is in part remedied by the 3 *W. c.* 9. which enacts, that if any person be *indicted* of any offence, for which by virtue of any *former* statute he is excluded from clergy, if he had been convicted by verdict or confession; if he stand mute, or will not answer directly, or challenge peremptorily above 20 of the jury, or be outlawed, he shall not be admitted to his clergy. *s.* 2. But this extends not to *appeals*, nor to offences made felonies by subsequent statutes. 2 *Haw.* 348.

But if the statute enacts generally, that it shall be felony without benefit of clergy, or that he shall suffer as in case of felony without benefit of clergy, this excludes it in all circumstances, and to all intents. 2 *H. H.* 335.

Therefore where clergy is excluded, the indictment must bring the offence within the statute.

5. It follows further, from what hath been said, that in all cases where an act of parliament ousteth clergy, in case of any felony, the indictment must precisely bring the party within the case of the statute; otherwise, altho' possibly the fact itself be within the statute, and it may so appear upon the evidence, yet if it be not so alledged in the indictment, the party, tho' convict, shall have his clergy. 2 *H. H.* 336.

But altho' the case be so laid in the indictment, that it comes within the statute, to exempt the prisoner from clergy, yet if upon the evidence it fall out, that tho' it be a felony, yet it is not so qualified as laid in the indictment, the jury ought to find him guilty of the felony simply, but not as to the manner laid in the indictment, and thereupon the prisoner shall be admitted to his clergy; and this is commonly done. 2 *H. H.* 336.

Indictment on a statute which ousteth of clergy an offence which was felony at common law.

6. But if the offence was capital at the common law, and a statute only excludes it from clergy; the indictment in such case need not conclude *against the form of the statute*, because the statute doth not alter the nature of the offence, but leaves it to its proper judgment, and only takes away a personal privilege of exemption from such judgment. 2 *Haw.* 342.

Accessary.

7. Furthermore, from what hath been observed above, it follows, that where an act taketh away clergy from the principal, and saith nothing of the accessary; the accessaries as well before, as after, shall have their clergy. 11 *Co.* 37. *Poulter's case.*

IV. At what time it must be demanded.

To be demanded after conviction.

1. By the ancient common law, the benefit of clergy was demanded, as soon as the prisoner was brought to the bar, before any indictment or other proceeding against him; but this was found a great inconvenience to the prisoner, because possibly he might have been acquitted of the felony; or if not, yet in case of an inquest of office, he lost his challenges to such inquest, and yet upon such inquest found, he forfeited his goods, and the profits of his lands; and therefore *Prisot* Ch. J. with the advice of the other judges, in the reign of *H.* 6. for the safety of the innocent, would not allow the prisoner the benefit of clergy before he had pleaded to the felony, and (having the benefit of his challenges

lenges and other advantages) had been convicted thereof: which course hath been generally observed ever since. 2 *Inst.* 164. 2 *H. H* 378.

2. And this benefit of clergy may be allowed by the court in discretion, tho' the party challenge it not. *Hale's Pl.* 239. May be allowed tho' not demanded.

V. Effect of clergy allowed.

1. Persons admitted to their clergy, may be continued in prison as a further punishment, not exceeding one year. 18 *El. c.* 7. Persons having their clergy may be continued in gaol.

2. And by 4 *G. c.* 11. Persons convicted of offences within benefit of clergy (except receivers and buyers of stolen goods) may, instead of being whipped and burnt in the hand, be transported for seven years. May be transported.

3. A person admitted to his clergy, forfeits all his goods that he hath at the time of the conviction. 2 *H. H.* 388. Shall forfeit their goods.

4. But presently upon his burning in the hand, he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof. 2 *H. H.* 388. But not lands.

5. Also, it restores him to his credit; and consequently enables him to be a good witness. 2 *Haw.* 364. Credit restored.

6. And it is holden that after a man is admitted to his clergy, it is actionable to call him felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. 2 *Haw.* 365. Actionable to call him felon.

Clerk of the peace.

1. THE *custos rotulorum* shall appoint an able and sufficient person, residing in the county or division, to execute the office of clerk of the peace, by himself or his sufficient deputy (to be allowed of by the said *custos rotulorum*, 37 *H.* 8. *c.* 1.); and to take and receive the fees, profits, and perquisites thereof, for so long time only as such clerk of the peace shall well demean himself in his said office. 1 *W. c.* 21. *s.* 5. Who shall appoint.

2. But the *custos rotulorum* shall not sell the place of clerk of the peace, or take any bond or other assurance, to receive any reward, fee, or profit, directly or indirectly, to him or to any other person for such appointment; on pain that such *custos rotulorum* selling, and such clerk of the peace buying, shall be disabled to hold their respective places, and shall each forfeit double value of the thing given, to him who shall sue. 1 *W. c.* 21. *s.* 8. Office not to be sold.

3. And every clerk of the peace, before he enters upon the execution of his office, shall in open sessions take the oath following; Oath.

" I *A. B.* do swear, that I have not, nor will pay any sum or " sums of money, or other reward whatsoever, nor given any

" bond or other aſſurance to pay any money, fee, or profit, di-
" rectly or indirectly, to any perſon or perſons whomſoever,
" for ſuch nomination and appointment: So help me god."
1 *W.* *c.* 21. *ſ.* 8.

Qualifying.

4. He ſhall moreover take the oaths of allegiance, ſupremacy, and abjuration, in the ſame manner as other perſons who qualify for offices.

Not to act as ſolicitor.

5. No clerk of the peace, or his deputy, ſhall act as ſolicitor, attorney, or agent, or ſue out any proceſs at any general or quarter ſeſſions, where he ſhall execute the office of clerk of the peace or deputy; on pain of 50*l.* to him who ſhall ſue in 12 months, with treble coſts. 22 *G.* 2. *c.* 46. *ſ.* 14.

Shall certify outlawries.

6. The clerk of the peace ſhall certify into the king's bench, the names of ſuch as be outlawed, attainted, or convicted of felony. 34 & 35 *H.* 8. *c.* 14.

Shall deliver eſtreats to the ſheriff.

7. He ſhall deliver to the ſheriff, within ten days after *Sep.* 29. yearly, a perfect eſtreat or ſchedule of all fines, and other forfeitures in ſeſſions. 22 & 23 *C.* 2. *c.* 22. *ſ.* 7.

Shall deliver eſtreats into the exchequer.

8. And ſhall alſo yearly, on or before the ſecond *Monday* after the morrow of all ſouls, deliver into the court of exchequer a perfect duplicate, certificate, and eſtreat of all ſuch eſtreats and ſchedules delivered to the ſheriffs; on pain of 50*l.* half to the king, and half to him that ſhall ſue. 22 & 23 *C.* 2. *c.* 22. *ſ.* 8. And moreover he may be amerced for the ſame, by the barons of the exchequer. 3 *G.* *c.* 15.

Upon oath.

9. And he ſhall, upon delivery of the ſaid eſtreats into the court of exchequer, take the following oath, to be adminiſtred by one of the barons;

" You ſhall ſwear, that theſe eſtreats, now by you delivered,
" are truly and carefully made up and examined, and that all fines,
" iſſues, amerciaments, recognizances, and forfeitures, which were
" ſet, loſt, impoſed, or forfeited, and in right and due courſe of
" law ought to be eſtreated in the court of exchequer, are, to
" the beſt of your knowledge and underſtanding, therein con-
" tained; and that in the ſame eſtreats are alſo contained and ex-
" preſſed, all ſuch fines as have been paid into the court, from
" which the ſaid eſtreats are made, without any wilful or fraudu-
" lent diſcharge, omiſſion, miſnomer, or defect whatſoever."
4 & 5 *W.* *c.* 24. *ſ.* 5.

Penalty of concealing fines.

10. And if he ſhall ſpare, take off, diſcharge, or conceal any ſuch fine or forfeiture, unleſs it be by rule of court, he ſhall forfeit treble value, half to the king, and half to him that ſhall ſue; and ſhall alſo forfeit his office, and be incapable to be employed in any office where the revenue is concerned. 22 & 23 *C.* 2. *c.* 22. *ſ.* 9.

Fees.

11. The clerk of the peace is not bound to enter judgment, or the like, at the ſuit of any, without having the fee due for the ſame; but if the court order any thing without ſuit of another, to wit, *ex officio*, there he ought to enter the ſame without any fee having for the entring thereof. *Crom.* 159.

Alſo

Alſo Mr. *Crompton* ſays, he ſhall have for every recognizance of the peace taken in court 2*s*. and for every releaſe of the peace there 2*s*. and for proceſs awarded againſt any to find ſurety of the peace 2*s*. *Crom*. 160.

And by 10 & 11 *W*. *c*. 23. he ſhall have only 2*s*. for drawing an indictment of felony; and if it is defective, he ſhall draw a new one *gratis*, on pain of 5*l*. with full coſts, to him that ſhall ſue. *ſ*. 7, 8.

His fees alſo in divers other caſes are ſpecially limited by act of parliament; and it ſeemeth to be one of the *deſiderata* in the juſtices law, that the clerk of the peace his fees are not aſcertained in all inſtances, even as thoſe of the other clerks to juſtices of the peace by the ſtatute of the 26 *G*. 2. *c*. 14. And withal it might be requiſite to inſert in the table to be agreed on for that purpoſe, by whom the ſame ſhall be paid in the ſeveral inſtances reſpectively, and what ſhall be the courſe of recovering the ſame on non-payment.

12. If any clerk of the peace ſhall miſdemean himſelf in the execution of his office, and thereupon a complaint and charge in writing of ſuch miſdemeanor ſhall be exhibited againſt him, to the juſtices in ſeſſions, the ſaid juſtices may, on examination and due proof thereof openly in the ſaid ſeſſions, ſuſpend or diſcharge him from the ſaid office; and in ſuch caſe, the *cuſtos rotulorum* ſhall appoint another able and ſufficient perſon, reſiding in the ſaid county or diviſion, to be clerk of the peace. And in caſe of refuſal or neglect to make ſuch appointment, before the next general quarter ſeſſions, the juſtices in ſeſſions may appoint one. 1 *W*. *c*. 21. *ſ*. 6. May be diſplaced for miſbehaviour.

His duty in other matters is interſperſed where it falls in amongſt the other titles of this book.

Clipping money. See Coin.
Clockmaking. See Servants.
Cloth and clothiers. See Woollen manufactures.
Coaches and chairs. See Exciſe and hackney coaches.

Coals and Coalpits.

1. BY the 10 *G*. 2. *c*. 32. (which by 24 *G*. 2. *c*. 57. is continued to *Sep*. 1. 1757, *&c*.) If any perſon ſhall wilfully and maliciouſly ſet on fire any mine, pit, or delph of coal or cannel coal; he ſhall be guilty of felony without benefit of clergy. Setting on fire.

Drowning.

2. And by 13 *G.* 2. *c.* 21. If any perſon ſhall divert or convey any water into any coal work, with deſign to deſtroy or damage the ſame; he ſhall pay to the party grieved treble damages with coſts.

Meaſure, price and duty on coals.

3. There are many regulations by ſeveral ſtatutes, concerning the weights, meaſures, and prices of coals, eſpecially in and about *London*, and alſo concerning the duties thereupon, which not being of general concern, I ſhall but juſt mention the ſtatutes, referring thereunto thoſe who are more particularly concerned.

Statutes concerning the meaſures and prices of coals, and regulating the coal trade in general, are,

9 *H.* 5. *c.* 10.	3 *G.* 2. *c.* 26.
16 & 17 *C.* 2. *c.* 2.	4 *G.* 2. *c.* 30.
30 *C.* 2. *c.* 8.	11 *G.* 2. *c.* 15.
6 & 7 *W.* *c.* 10.	17 *G.* 2. *c.* 35.
9 *An.* *c.* 28.	19 *G.* 2. *c.* 35.
12 *An.* *ſt.* 2. *c.* 17.	23 *G.* 2. *c.* 26.

Statutes concerning the duties on coals;

1 *J.* 2. *c.* 15.	9 *An.* *c.* 23. *ſ.* 90.
6 & 7 *W.* *c.* 18.	12 *An.* *ſt.* 2. *c.* 9.
9 & 10 *W.* *c.* 13.	1 *G.* *ſt.* 2. *c.* 23.
10 & 11 *W.* *c.* 21.	5 *G.* *c.* 9.
8 *An.* *c.* 4.	22 *G.* 2. *c.* 37.
9 *An.* *c.* 6.	

Cocoa nuts. See Exciſe.
Coffee. See Exciſe.

Coin.

For matters common to this with other treaſons, ſee title Treaſon.

Original of the word.

1. COIN, in *French*, ſignifieth a corner, and from thence hath its name (according to Lord *Coke*); becauſe in ancient time money was ſquare with corners, as it is in ſome countries at this day. 1 *Inſt.* 207.

Others derive this word, which in the old *French* is written *coign*; as alſo the *Italian cunio*, and the *Spaniſh cuno*, from the *Greek* word κοινὸς, *communis*; becauſe money is the common mean or inſtrument of traffick.

But theſe derivations are too artificial. The word doth properly ſignify a wedge, as the *Latin cuneus*; and hath a verb belonging to it in the ſeveral languages: and is tranſlated to lawful money; either from the form of a wedge ingot or lingot *(linguetta)* in which bullion was tranſported from all antiquity; or

elſe from the inſtrument, a wedge or chiſſel, with which in trade, theſe lingots were occaſionally cut to the weight required, as they are at this day in the *Eaſt Indies*, with ſheers.

2. The legitimation of money, and the giving it it's denominated value, is one ſpecial part of the king's prerogative. 1 *H. H.* 188. Value of coin.

3. And the king may by his proclamation legitimate foreign coin, and make it current money of this kingdom, according to the value impoſed by ſuch proclamation. 1 *H. H.* 192. Legitimating foreign coin.

And therefore both *Engliſh* money, coined by the king's authority, and foreign coin made current by proclamation, are within the denomination of lawful money of *England*. 1 Inſt. 207.

4. But only gold or ſilver coin, and not braſs or copper, are within this denomination. 1 *Haw.* 42. Copper coin.

And no perſon can be inforced to take in payment any money but of lawful metal, that is, of ſilver or gold. 2 *Inſt.* 577. Except for ſums under ſix pence. 1 *H. H.* 195.

5. By the ſtatute of 25 *Ed.* 3. *ſt.* 5. *c.* 2. it is made treaſon to counterfeit the coin of this realm: That is to ſay, whether the perſon utter it or not. 3 *Inſt.* 16. 1 *Haw.* 42. Counterfeiting the coin of this realm.

6. And if any perſon ſhall falſly forge and counterfeit any ſuch kind of coin of gold or ſilver, as is not the proper coin of this realm, and ſhall be current therein by the king's conſent; he, his counſellors, procurers, aiders and abettors, ſhall be guilty of high treaſon. 1 *Mar. Seſſ.* 2. *c.* 6. Counterfeiting foreign current coin.

7. By the 5 *El. c.* 11. Clipping, waſhing, rounding, or filing, for lucre or gain, any the proper coin of this realm or the dominions thereof, or of any other realm current within this realm by proclamation, ſhall be adjudged treaſon in the offenders, their counſellors, conſenters, and aiders. Clipping, waſhing, filing.

8. And by the 18 *El. c.* 1. If any perſon ſhall, for lucre or gain, by any art, ways, or means, impair, diminiſh, falſify, ſcale, or lighten the proper coin of this realm, or any the dominions thereof, or the coin of this realm allowed to be current at the time of the offence committed, by the king's proclamation; he, his counſellors, conſenters, and aiders ſhall be guilty of treaſon. Impairing, diminiſhing, falſifying.

9. And if any perſon (not employed in the mint) ſhall mark on the edges any the current coin of this kingdom; or, if any perſon whatſoever ſhall mark on the edges any of the diminiſhed coin of this kingdom, or any counterfeit coin reſembling the coin of this kingdom, with letters or grainings, or other marks or figures like unto thoſe on the edges of money coined in the mint; he, his counſellors, procurers, aiders, and abettors ſhall be guilty of high treaſon. 8 & 9 *W. c.* 26. *ſ.* 3. Proſecution to be in ſix months. 1 *An. ſt.* 1. *c.* 9. Edging.

10. Alſo, if any perſon ſhall colour, gild, or caſe over with gold or ſilver, or with any waſh or materials producing the colour of gold or ſilver, any coin reſembling any the current coin of this kingdom, or any round blanks of baſe metal, or of coarſe gold or coarſe ſilver, of a fit ſize and figure to be coined into counterfeit milled money, reſembling any the gold or ſilver coin of this kingdom; or if any perſon ſhall gild over any ſilver blanks of a fit Colouring.

ſize and figure to be coined into pieces reſembling the current gold coin of this kingdom; he, his counſellors, procurers, aiders, and abettors ſhall be guilty of high treaſon. 8 & 9 *W.* *c.* 26. *ſ.* 4. Proſecution to be in three months. *ſ.* 9.

And by the 15 & 16 *G.* 2. *c.* 28. If any perſon ſhall waſh, gild, or colour any lawful or counterfeit ſilver coin called a ſhilling or ſixpence, or add to or alter the impreſſion, or any part thereof, on either ſide, with intent to make ſuch ſhilling or ſixpence reſemble a guinea or half guinea; or ſhall any way alter or colour halfpenies or farthings, with intent to make them reſemble a ſhilling or ſixpence; he, his counſellors, aiders, and abettors ſhall be guilty of high treaſon. Proſecution to be in ſix months.

Counterfeiting halfpence and farthings.

11. Lord *Hale*, ſpeaking of copper halfpence and farthings, makes it a quæry, whether the counterfeiting of them be not treaſon within the ſtatute of 25 *Ed.* 3. but inclines to the negative. 1 *H. H.* 195, 211, 212.

And with this agrees the ſenſe of the legiſlature, in the ſtatute of 15 & 16 *G.* 2. *c.* 28. which reciting that whereas the counterfeiting of the copper coin of this kingdom is only a miſdemeanor, and the puniſhment often very ſmall, therefore enacteth, that if any perſon ſhall coin or counterfeit braſs or copper halfpence or farthings; he, his counſellors, aiders, and abettors, ſhall ſuffer two years impriſonment, and find ſureties for their good behaviour for two years more. *ſ.* 6.

Nevertheleſs, experience aſſureth that this penalty is ſtill far too ſmall; for ſince the making of this act, counterfeit halfpence have abounded even more than they did before, to the great injury of trade, and vexation of the people: inſomuch that I have known in a common country church a dozen or fourteen bad halfpence, good for nothing, collected upon a common charity brief; which, at the ſame rate throughout the kingdom, is 250 *l.* loſs to the petitioners. Nay even the act itſelf may poſſibly have tended to defeat its own good deſign; for hereby the offenders are aſſured (which before was in ſome ſort doubtful to them) that the crime is not treaſon nor felony.

Counterfeiting coin not current.

12. If any perſon ſhall falſly forge or counterfeit any ſuch kind of coin of gold or ſilver, as is not the proper coin of this realm, nor permitted to be current within this realm; he, his procurers, aiders, and abettors ſhall be guilty of miſpriſion of high treaſon. 14 *El.* *c.* 3.

Bringing in falſe money.

13. If any perſon ſhall bring falſe money into the realm, counterfeit to the money of *England*, knowing the ſame to be falſe, to merchandiſe or make payment, in deceit of the king and his people; he ſhall be guilty of high treaſon. 25 *Ed.* 3. *ſt.* 5. *c.* 2.

Alſo, if any perſon ſhall bring from the parts beyond the ſea, any forged and counterfeit money like to the gold or ſilver coin of foreign realms, current in payment within this realm by the king's ſufferance and conſent, knowing the ſame to be falſe and counterfeit, to the intent to utter or make payment of the ſame within this realm, by merchandizing or otherwiſe; he, his counſellors, procurers, aiders, and abettors ſhall be guilty of high treaſon. 1 & 2 *P.* & *M.* *c.* 11. *ſ.* 2.

Note;

Note; This muſt be brought from a foreign nation, and not from *Ireland*, or other place ſubject to the crown of *England*; becauſe the counterfeiting there, is puniſhable by the laws of our king, as much as in *England*. 1 *Hawv.* 43.

14. If any preſs for coinage, ſhall be found in the cuſtody of any perſon (other than the officers of the mint), it ſhall be ſeized for the king's uſe; and every perſon in whoſe cuſtody ſuch preſs ſhall be found, ſhall forfeit 500 *l.* half to the king, and half to the informer. 7 & 8 *W. c.* 19. *ſ.* 4. Coining preſs and tools.

And by 8 & 9 *W. c.* 26. No perſon, unleſs employed in the mint, ſhall knowingly make or mend, or begin or proceed to make or mend, or aſſiſt in the making or mending of any puncheon, counter-puncheon, matrix, ſtamp, dye, pattern, or mould, of ſteel, iron, ſilver, or other metal, or of ſpaud, or fine founders earth, or ſand, or of any other materials whatſoever, in or upon which there ſhall be, or be made or impreſſed, or which will make or impreſs the figure, ſtamp, or reſemblance of both or either of the ſides or flats of any gold or ſilver coin, current within this kingdom; nor ſhall knowingly make or mend, or begin or proceed to make or mend, or aſſiſt in the making or mending of any edger or edging tool, inſtrument, or engine, not of common uſe in any trade, but contrived for making of money round the edges with letters, grainings, or other marks or figures reſembling thoſe on the edges of money coined in the mint; nor any preſs for coinage; nor any cutting engine for cutting round blanks by force of a ſcrew, out of flatted bars of gold, ſilver, or other metal; nor ſhall knowingly buy or ſell, hide or conceal, or without lawful authority or ſufficient excuſe for that purpoſe, knowingly have in his houſe, cuſtody, or poſſeſſion, any ſuch puncheon, counter puncheon, matrix, ſtamp, dye, edger, cutting engine, or other tool or inſtrument before mentioned; on pain that ſuch perſon, his counſellors, procurers, aiders, and abettors, ſhall be guilty of high treaſon. *ſ.* 1. Proſecution to be in ſix months. 1 *An. ſt.* 1. *c.* 9. *ſ.* 2.

And if any perſon ſhall, without lawful authority, knowingly convey, or aſſiſt in conveying out of the mint, any puncheon, counter-puncheon, matrix, dye, ſtamp, edger, preſs, or other tool, engine, or inſtrument uſed for or about the coining of monies there, or any uſeful part of ſuch tool or inſtrument; he, his counſellors, procurers, aiders, or abettors, ſhall be guilty of high treaſon. 8 & 9 *W. c.* 26. *ſ.* 2. Proſecution to be in 3 months. *ſ.* 9.

And if any puncheon, dye, ſtamp, edger, cutting engine, preſs, flaſk, or other tool, inſtrument, or engine, uſed or deſigned for coining or counterfeiting gold or ſilver monies, or any part of ſuch tool or engine, ſhall be hid or concealed in any place, or found in the houſe, cuſtody, or poſſeſſion of any perſon not employed in the mint, nor having the ſame by ſome lawful authority; any perſon whatſoever diſcovering the ſame, may and ſhall ſeize the ſame, and carry them forthwith to ſome juſtice of the peace to be by him ſecured, to be produced in evidence againſt any perſon who ſhall be proſecuted for any ſuch offence. And

after they have been produced in evidence, they ſhall forthwith by order of the court (or by order and in the preſence of a juſtice of the peace, if there hath been no trial) be totally defaced and deſtroyed. 8 & 9 *W. c.* 26. *ſ.* 5.

Selling of clippings.

15. For the better preventing the clipping, diminiſhing, or impairing the current coin, if any perſon ſhall buy or ſell, and knowingly have in his cuſtody or poſſeſſion, any clippings or filings of the current coin of this kingdom; he ſhall forfeit the ſame, and alſo 500 *l.* half to the king, and half to the informer; and ſhall be branded in the right cheek with the letter R; and be impriſoned till the payment of the 500 *l.* 6 & 7 *W. c.* 17. *ſ.* 4.

Bullion.

16. And if any ſhall caſt ingots or bars of ſilver, in imitation of *Spaniſh* bars or ingots, or ſtamp them in likeneſs of the *Spaniſh* ſtamp, he ſhall forfeit the ſame, and alſo 500 *l.* half to the king, and half to the informer. 6 & 7 *W. c.* 17. *ſ.* 2.

And if any broker, not being a trading goldſmith or refiner of ſilver, ſhall buy or ſell any bullion or molten ſilver, he ſhall be impriſoned ſix months. *ſ.* 7.

And two juſtices may ſearch (and with the help of a conſtable may break open houſes, trunks, or boxes, to ſearch) for bullion ſuſpected to be concealed; and if found, they ſhall ſeize the ſame, and the perſon in whoſe poſſeſſion it ſhall be found; and if ſuch perſon ſhall not prove by the oath of himſelf, or of a credible witneſs, that it is lawful ſilver, and was not current coin, nor clippings thereof, he ſhall be committed; and if on his trial he ſhall not prove the ſame by one witneſs, he ſhall be impriſoned ſix months. *ſ.* 8.

And no perſon ſhall ſhip any molten ſilver or bullion, without certificate from the court of the lord mayor and aldermen of *London*, and oath made before them by the owner and two witneſſes, that it is foreign bullion, and that no part of it was the coin of this realm, or clippings thereof, nor plate wrought within this kingdom; on pain of forfeiting the ſame, half to the king, and half to him who ſhall ſue. And the maſter or captain of a ſhip permitting the ſame, ſhall forfeit 200 *l.* to him who ſhall ſue; and if it is a king's ſhip, he ſhall alſo forfeit his employment. Alſo any officer of the cuſtoms offending herein, ſhall forfeit 200 *l.* and his office. And in caſe of ſeizure of ſuch bullion, or action brought for the forfeitures, the proof ſhall lie upon the owner; and for want of proof, it ſhall be forfeited. 7 & 8 *W. c.* 19. *ſ.* 8, 9.

And if any bullion is entred to be exported, other than in the name of the true owner, it ſhall be forfeited, half to the king, and half to him who ſhall ſeize or diſcover the ſame. 6 & 7 *W. c.* 17. *ſ.* 14.

Blanched copper and other baſe metal.

17. And whereas ſeveral mixtures of metals have been invented in imitation of gold and ſilver, and blanched copper is principally made uſe of in imitation of ſilver, and ſeldom, if ever, for any honeſt or good purpoſe, it is enacted, that if any perſon ſhall blanch copper for ſale, or mix blanched copper with ſilver, or knowingly buy or ſell or offer to ſale blanched copper alone, or mixed with ſilver; or ſhall knowingly and fraudulently buy

buy or ſell or offer to ſale any malleable compoſition or mixture of metals or minerals, which ſhall be heavier than ſilver, and look, and touch, and wear like ſtandard gold, but be manifeſtly worſe than ſtandard; he ſhall be guilty of felony, and ſhall ſuffer death as in caſe of felony. Proſecution to be in three months. 8 & 9 *W. c.* 26. *ſ.* 6, 9.

18. If any perſon ſhall take, receive, pay, or put off any counterfeit milled money, or any milled money whatſoever unlawfully diminiſhed, and not cut in pieces, at or for a lower rate or value, than the ſame by its denomination doth or ſhall import, or was coined or counterfeited for; he ſhall be guilty of felony, and ſuffer death as in caſe of felony. Proſecution to be in three months. 8 & 9 *W. c.* 26. *ſ.* 6, 9. Paying coin under value.

19. If one perſon counterfeits, and by agreement before that counterfeiting, another perſon is to take off and vent the counterfeit money, ſuch other is an aider and abettor, and conſequently a principal traytor (for in high treaſon there are no acceſſaries). 1 *H. H.* 214. Uttering falſe money.

If one perſon counterfeit, and another (knowing that he did ſo) puts it off, but without any ſuch previous agreement; ſuch other perſon ſeems to be all one with a receiver of him, becauſe he maintains him. 1 *H. H.* 214.

If one perſon counterfeit, and another perſon know that he did ſo, and doth neither receive, maintain, or abet him, but conceals his knowledge; this is miſpriſion of treaſon. 1 *H. H.* 214.

But, formerly, where it did not appear, that the utterer of counterfeit money knew who counterfeited it, but barely uttered it for his own benefit, altho' he knew it was counterfeit, yet it was only a cheat and miſdemeanor, puniſhable by fine and impriſonment (contrary to the opinion in *Stamford* and *Dalton*); but now, by the ſtatute of 15 *G.* 2. *c.* 28. it is enacted, that whereas the uttering falſe money is a crime frequently committed all over the kingdom, and the offenders are not deterred, becauſe it is only a miſdemeanor, and the puniſhment generally ſmall, tho' there is reaſon to believe that the utterers are often the coiners, or in confederacy with them; therefore, if any perſon ſhall tender in payment any counterfeit coin, knowing it to be ſo, he ſhall for the firſt offence ſuffer ſix months impriſonment, and find ſureties for his good behaviour for ſix months longer; for the ſecond offence, ſhall ſuffer two years impriſonment, and find ſureties for two years more; and for the third offence, ſhall be guilty of felony without benefit of clergy. *ſ.* 2.

And if any perſon ſhall tender in payment any counterfeit money (knowing it to be ſo), and ſhall either the ſame day, or within ten days after, knowingly tender other falſe money in payment, or at the time of ſuch tendering have more in his cuſtody; he ſhall for the firſt offence ſuffer a year's impriſonment, and find ſureties for his good behaviour for two years more; and for the ſecond offence, ſhall be guilty of felony without benefit of clergy. *ſ.* 3.

Perſons guilty of the ſaid crimes ſhall be tried and convicted in ſuch manner as is uſed againſt offenders for counterfeiting the coin: and the clerk of aſſize, or clerk of the peace, where the firſt conviction

viction was had, ſhall certify the ſame by a tranſcript in few words, containing the tenor of ſuch conviction (for which he ſhall have 2*s.* 6*d.*); and ſuch certificate being produced in court, ſhall be ſufficient proof of the former conviction. Proſecution to be in ſix months. *ſ.* 5, 9.

Note; By this it ſhould ſeem, that the juſtices of the peace in ſeſſions have power to try ſuch offenders; otherwiſe this direction to the clerk of the peace to certify the conviction is impertinent; for he is not the proper perſon to certify what is done in another court, where he is not neceſſarily ſuppoſed to be preſent: albeit no power is given to the ſeſſions by any expreſs words in this ſtatute to hear and determine ſuch offences.

Having falſe money in poſſeſſion.

20. If falſe or clipt money be found in a man's hands; if he be ſuſpicious, he may be arreſted till he have found his warrant. 3 *Inſt.* 18. *Hale's Pl.* 21. 1 *Hawk.* 43.

False money what to be done with.

21. Any perſon to whom any ſilver money ſhall be tendred, any piece whereof ſhall be diminiſhed, otherwiſe than by reaſonable wearing, or that by the ſtamp, impreſſion, colour, or weight thereof, he ſhall ſuſpect to be counterfeit, may cut, break, or deface ſuch piece: and if any piece ſo cut, broken, or defaced ſhall appear to be counterfeit, the perſon tendring the ſame ſhall bear the loſs thereof; but if the ſame ſhall be of due weight, and appear to be lawful money, the perſon that cut, broke, or defaced the ſame, ſhall receive the ſame at the rate it was coined for. And if any queſtion ariſe, whether the piece ſo cut be counterfeit, it ſhall be determined by the next juſtice of the peace, or chief magiſtrate in a corporation. 9 & 10 *W.* *c.* 21. *ſ.* 1.

And if any counterfeit or unlawfully diminiſhed money ſhall be produced in any court of juſtice, either in evidence or otherwiſe, the judge ſhall cauſe it to be cut in pieces in open court, or in the preſence of a juſtice of the peace, and then to be delivered to or for the perſon to whom it belongs. 8 & 9 *W.* *c.* 26. *ſ.* 5.

Bail.

22. By the 3 *Ed.* 1. *c.* 15. Perſons taken for falſe money are not bailable by juſtices of the peace.

But they muſt take the examinations and informations, and bind over the witneſſes to the proper court, and commit the perſons accuſed. 1 *H. H.* 372.

Evidence.

23. It is not neceſſary there ſhould be two witneſſes in caſes of counterfeiting the coin, as it is in other high treaſons; but perſons may be convicted according to the courſe of the common law, by one witneſs only. 1 *H. H.* 318, 328.

Judgment.

24. The judgment for high treaſon, relating to the coin, is, to be drawn to the place of execution, and there hanged by the neck till he be dead. 2 *Hawk.* 444.

But it is generally provided by the ſeveral ſtatutes, that this ſhall work no corruption of blood, nor loſs of dower.

Excepted out of the general pardon.

25. The aboveſaid offences relating to the coin, are excepted out of the general pardon, of the 20 *G.* 2. *c.* 52.

Reward for convicting an offender.

26. Every perſon who ſhall apprehend any perſon who hath counterfeited any of the current [gold or ſilver] coin of this realm; or that for lucre or gain hath clipped, waſhed, filed, or any way diminiſhed the ſame; or hath altered ſhillings and ſixpences to make

make them resemble guineas and half guineas, or halfpenies and farthings to make them look like shillings and sixpences; or shall bring or cause to be brought into this kingdom, any clipt, false, or counterfeit coin; and prosecute such person to conviction: every such person shall have a reward of 40*l.* In order to which, the judge shall give him under his hand, a certificate certifying the conviction, and the county in which it was made, and that the offender was taken and prosecuted by such person; and if any dispute shall arise between several persons apprehending and prosecuting, the judge shall in the certificate appoint the reward to be paid amongst them, in such proportion as he shall think reasonable. The said certificate to be tendred to the sheriff, who shall thereupon pay the same without fee, within one month after such tender and demand, on pain of forfeiting to the party double the sum, with treble costs. The sheriff to be repaid out of the treasury. 6 & 7 *W.* *c.* 17. *s.* 9, 10, 11. 15 & 16 *G.* 2. *c.* 28. *s.* 7.

In like manner a reward of 10*l* shall be paid, for apprehending and convicting a counterfeiter of the copper money. 15 & 16 *G.* 2. *c.* 28. *s.* 7.

Pardon to accomplices informing.

27. If any person, being out of prison, shall be guilty of clipping, coining, counterfeiting, washing, filing, or otherwise diminishing the [gold or silver] coin of this realm, and afterwards discover two or more persons who have committed any of the said crimes, so as two or more be convicted; he shall have the king's pardon, and if he is an apprentice, he shall be made a freeman. 6 & 7 *W.* *c.* 17. *s.* 12.

In this clause at large in the statute, is an instance of that multiplicity of words, which is sometimes ridiculed in our laws; where it is said, *two or more person or persons*, and again, *two or more of the person or persons.*

Further; If any person, being out of prison, shall be guilty of altering sixpences or shillings, to make them look like half guineas or guineas; or altering farthings or halfpenies, to make them look like sixpences or shillings; or of counterfeiting brass or copper halfpenies or farthings; or of uttering false money, ——— and afterwards discover two or more persons who have committed any of the said crimes, so as two be convicted; he shall have the king's pardon. 15 & 16 *G.* 2. *c.* 28. *s* 8.

Charges of prosecuting.

28. The commissioners of the treasury may issue a sum not exceeding 600*l.* yearly, for the charges and expences of the officers and others employed in the prosecution of offences in counterfeiting, diminishing, or otherwise concerning the current coins of this realm. 7 *An.* *c.* 24. *s.* 4. 15 & 16 *G.* 2. *c.* 28. *s.* 10.

Commit-

Commitment.

Without warrant.

ANciently there were more felons committed to gaol without mittimus in writing, than were with it: ſuch were all the commitments by conſtables, watchmen, and private perſons arreſting for felony, and bringing to the common gaol, long before there were any juſtices of the peace; and yet mittimus's are not of ſo ancient date even as they. 1 *H. H.* 610.

But now, ſince the *habeas corpus* act, a commitment in writing ſeems more neceſſary than it was in former times; otherwiſe the priſoner may be admitted to bail upon that act, whatſoever his offence may have been.

Commitment, when.

When a ſtatute appoints impriſonment, but limits no time when, it is to be underſtood that he ſhall be impriſoned preſently. *Dalt. c.* 170.

Concerning which I will ſet forth,

I. Who may be committed.
II. To what place.
III. The form of the commitment.
IV. Charges of the commitment.
V. That the gaoler ſhall receive the priſoner.
VI. Shall certify the commitment.
VII. Commitment diſcharged.

Who may be committed:

I. Who may be committed.

Perſons not bailable, or not finding bail.

1. There is no doubt, but that perſons apprehended for offences which are not bailable, and alſo all perſons who neglect to offer bail for offences which are bailable, muſt be committed. 2 *Haw.* 116.

Perſons guilty of contempt.

2. And it is ſaid, that wherefoever a juſtice is impowered by any ſtatute to bind a perſon over, or to cauſe him to do a certain thing, and ſuch perſon being in his preſence ſhall refuſe to be bound, or to do ſuch thing, the juſtice may commit him to the gaol, to remain there till he ſhall comply. 2 *Haw.* 116.

Perſons charged with felony.

3. If a priſoner be brought before a juſtice, expreſly charged with felony upon oath, the juſtice cannot diſcharge him, but muſt bail or commit him. 2 *H. H.* 121.

Perſons charged on ſuſpicion.

4. But if he be charged with ſuſpicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the juſtice may diſcharge him; as if a man be charged with felony for ſtealing a parcel of the freehold, or for carrying away what was delivered to him, and ſuch like, for which tho' there may be cauſe to bind him over as for a treſpaſs, the juſtice may diſcharge him as to felony, becauſe it is not felony. But if a man be killed by another,

another, tho' it be by misadventure, or self defence (which is not properly felony), or in making an assault upon a minister of justice in execution of his office (which is not at all felony), yet the justice ought not to discharge him, for he must undergo his trial for it; and therefore he must be committed, or at least bailed. 2 *H. H.* 121.

5. But commitment by the justices of the peace almost in all cases (except for the peace, good behaviour, felony, or higher offences) is but to retain the party till he hath made fine to the king; and therefore if he offer to pay it, or find sureties by recognizance to pay it, he ought not to be committed, but to be delivered presently. *Dalt. c.* 170. Persons not paying their fine.

II. To what place.

To what place:

1. All felons shall be committed to the common gaol, and not elsewhere. 5 *H.* 4. *c.* 10. To the gaol.

2. But vagrants and other criminals, offenders, and persons charged with small offences, may for such offences, or for want of sureties, be committed either to the common gaol, or house of correction, as the justices in their judgment shall think proper. 6 *G. c.* 19. House of correction.

3. And they may commit other offenders to the stocks, or other custody, by particular statutes. Stocks.

4. Generally, if a man commit felony in one county, and be arrested for the same in another county, he shall be committed to gaol in that county where he is taken. *Dalt. c.* 170. Different county.

Yet if he escapes, and is taken on fresh suit, in another county, he may be carried back to the county where he was first taken. *Dalt. c.* 170.

Also by the 24 *G.* 2. *c.* 55. If a person is apprehended, upon a warrant indorsed, in another county, for an offence not bailable, or if he shall not there find bail, he shall be carried back into the first county, and be committed (or if bailable, bailed) by the justices in such first county.

III. Form of the commitment.

Form:

1. It must be in writing, either in the name of the king, and only tested by the person who makes it, or it may be made by such person in his own name, expressing his office, or authority, and must be directed to the gaoler, or keeper of the prison. 2 *Haw.* 119. In whose name

Yet the mention of the name and authority of the justice, in the beginning of the mittimus, is not always necessary, for the seal and subscription of the justice to the mittimus is sufficient warrant to the gaoler; for it may be supplied by avermont, that it was done by the justice. 2 *H. H.* 122.

2. It should contain the name and surname of the party committed, if known; if not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his The party's name.

his hair, and the like, and to add that he refuſeth to tell his name. 1 *H. H.* 577.

Oath. 3. It is ſafe, but not neceſſary, to ſet forth, that the party is charged upon oath. 2 *Haw.* 120.

Cauſe. 4. It ought to contain the cauſe, as for treaſon, or felony, or ſuſpicion thereof; otherwiſe if it contain no cauſe at all, if the priſoner eſcape it is no offence at all; whereas if the mittimus contained the cauſe, the eſcape were treaſon or felony, tho' he were not guilty of the offence; and therefore for the king's benefit, and that the priſoner may be the more ſafely kept, the mittimus ought to contain the cauſe. 2 *Inſt.* 52.

And hereupon it appeareth, that a warrant or mittimus to anſwer to ſuch things as ſhall be objected againſt him, is utterly againſt law. 2 *Inſt.* 591.

Alſo, it ought to contain the certainty of the cauſe; and therefore if it be for felony, it ought not to be generally for felony, but it muſt contain the ſpecial nature of the felony briefly, as for felony *for the death of ſuch an one*, or for burglary *in breaking the houſe of ſuch an one*; and the reaſon is, becauſe it may appear to the judges of the king's bench, upon an *habeas corpus*, whether it be felony or not. 2 *H. H.* 122.

But the want hereof ſeems not to make the commitment abſolutely void, ſo as to ſubject the gaoler to a falſe impriſonment; but it lies in averment to excuſe the gaoler or officer, that the matter was for felony. 1 *H. H.* 584.

Concluſion. 5. It muſt have an apt concluſion; as if it is for felony, to detain him till he be thence delivered by law, or by order of law, or by due courſe of law. 2 *Haw.* 120. 2 *H. H.* 123.

But if the concluſion be irregular, it doth not ſeem to make the warrant void, but the law will reject that which is ſurpluſage, and the reſt ſhall ſtand; ſo that if the matter appear to be ſuch, for which he is to remain in cuſtody, or be bailed, he ſhall be bailed or committed as the caſe requires, and not diſcharged, but the wrong concluſion ſhall be rejected. 1 *H. H.* 584.

It is alſo to be obſerved, that a commitment grounded on an act of parliament, ought to be conformable to the method preſcribed by it. As where the overſeers were committed for refuſing to account, and the warrant concluded in the common form, until they be duly diſcharged according to law, upon the return of an *habeas corpus* the court held the commitment void, becauſe the warrant ought to have concluded, there to remain until he ſhall account, as the 43 *El. c.* 2. doth appoint. And a difference is, where a man is committed as a criminal, and where only for contumacy; in the firſt caſe, the commitment muſt be, until diſcharged according to law; but in the latter, until he comply. 2 *Haw. Not.* 33.

Where a ſtatute appoints impriſonment, but limits no time how long, in ſuch caſe the priſoner muſt remain at the diſcretion of the court. *Dalt. c.* 170.

Seal. 6. It muſt be under ſeal; and without this, the commitment is unlawful, the gaoler is liable to a falſe impriſonment, and the wilful

ful escape by the gaoler, or breach of prison by the felon, makes no felony. 1 *H. H.* 583.

But this must not be intended of a commitment by the sessions, or other court of record; for there the record it self, or the memorial thereof, which may at any time be entred of record, are a sufficient warrant, without any warrant under seal. 1 *H. H.* 584.

7. It should also set forth the place at which it is made. 2 *Haw.* 119. Place.

8. It must also have a certain date, of the year and day. 2 *H. H.* 123. Time.

IV. Charges of the commitment.

By the 3 *J. c.* 10. Every person who shall be committed to the common or usual gaol, within any county or liberty, by any justice of the peace, for any offence or misdemeanor, the said person so to be committed, having means or ability thereunto, shall bear his own reasonable charges for so conveying or sending him to the said gaol, and the charges also of such as shall be appointed to guard him to such gaol, and shall so guard him thither: And if any such person so to be committed, shall refuse at the time of his commitment and sending to the said gaol, to defray the said charges, or shall not then pay or bear the same; then such justice shall by writing under his hand and seal, give warrant to the constable of the hundred, or constable of the township where such person shall be dwelling and inhabit, or from whence he shall be committed, or where he shall have any goods within the county or liberty, to sell such and so much of the goods and chattels of the said person so to be committed, as by the discretion of the said justice shall satisfy and pay the charges of such his conveying and sending to the said gaol, the appraisement to be made by four of the honest inhabitants of the parish where such goods shall be; the overplus to be delivered to the party. Charges.

And by the statute of the 27 *G.* 2. *c.* 3. When any person, not having goods or money in the county where he is taken, sufficient to bear the charges of himself and of those who convey him, is committed to gaol, or to the house of correction, by warrant from a justice, then on application by the constable or other officer who conveyed him, to any justice for such county or place, [such justice] shall upon oath examine into and ascertain the reasonable expences, and shall without fee by his warrant order the treasurer to pay the same. But in *Middlesex*, the same shall be paid by the overseers of the poor of the parish where the person was apprehended.

Note; By the *habeas corpus* act, the charges of conveying an offender is limited not to exceed 12 *d.* a mile; which may be an argument for allowing as much in this case, especially as security is to be given before a man is removed on that act by *habeas corpus*, that he shall not escape by the way, which renders guards in that case not so necessary.

V. Gaoler

V. Gaoler ſhall receive the priſoner.

Gaoler refuſing to receive.

If the gaoler ſhall refuſe to receive a felon, or take any thing for receiving him, he ſhall be puniſhed for the ſame, by the juſtices of gaol delivery. 4 *Ed.* 3. *c.* 10. *Dalt. c.* 170.

But if a man be committed for felony, and the gaoler will not receive him, the conſtable muſt bring him back to the town where he was taken; and that town ſhall be charged with the keeping of him, until the next gaol delivery: Or the perſon that arreſted him, may in ſuch caſe keep the priſoner in his own houſe, as it ſeemeth. *Dalt. c.* 170.

But in other caſes it ſeems, that regularly no one can juſtify the detaining a priſoner in cuſtody out of the common gaol, unleſs there be ſome particular reaſon for ſo doing; as if the party be ſo dangerouſly ſick, that it would apparently hazard his life to ſend him to the gaol, or there be evident danger of a *reſcous* from rebels, or the like. 2 *Haw.* 118.

VI. The gaoler ſhall certify the commitment.

Commitment to be certified.

By the 3 *H.* 7. *c.* 3. The ſheriff or gaoler ſhall certify the commitments, to the next gaol delivery.

VII. Commitment diſcharged.

Commitment diſcharged.

It ſeems that a perſon legally committed for a crime, certainly appearing to have been done by ſome one or other, cannot be lawfully diſcharged by any one but the king, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to proſecute him on a proclamation for that purpoſe by the juſtices of gaol delivery. But if a perſon be committed on a bare ſuſpicion, without an indictment, for a ſuppoſed crime, where afterwards it appears that there was none, as for the murder of a perſon thought to be dead, who afterwards is found to be alive; it hath been holden, that he may be ſafely diſmiſſed without any farther proceeding, for that he who ſuffers him to eſcape is properly puniſhable only as an acceſſary to his ſuppoſed offence; and it is impoſſible that there ſhould be an acceſſary, where there can be no principal; and it would be hard to puniſh one for a contempt, in diſregarding a commitment founded on a ſuſpicion, appearing in ſo unconteſted a manner to be groundleſs. 2 *Haw.* 121.

Mittimus for felony.

Weſtmorland. SIR John Pennington, *baronet, one of the juſtices of our lord the king, aſſigned to keep the peace in the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed; To the keeper of the gaol of our ſaid lord the king at* ——— *in the ſaid county, or to his deputy there, and to each of them, greeting. Whereas* A. O. *late of* ——— *in the ſaid county, labourer,*

labourer, hath been arrested by the constable of ——— *in the said county, for suspicion of a felony by him, as it is said, committed, in stealing a black mare, of the value of* 40s. *the property of* A. P. *of* ——— *in the said county, yeoman: Therefore on the behalf of our said lord the king, I command you and each of you, that you or one of you receive the said* A. O. *into your custody in the said gaol, there to remain till he be delivered from your custody by the law and custom of* England. *Given under my hand and seal at* ——— *in the said county, the* ——— *day of* ——— *in the* ——— *year of the reign of our said lord* ———.

Another.

Westmorland. J. P. *esquire*, &c. *To the keeper of the common gaol at* ——— *in the said county, or to his deputy there: These are in his majesty's name to charge and command you, that you receive into your said gaol, the body of* A. O. *late of* ——— *in the said county, yeoman, taken by* A. C. *constable of* ——— *in the said county, and by him brought before me for suspicion of felony, that is to say, for stealing* ——— *And that you safely keep the said* A. O. *in your said gaol, until the next general gaol delivery for the said county* [if he be not bailable; or if bailable, then thus] *until he shall thence be delivered by due course of law. And hereof fail you not*, &c.

Another.

Westmorland. J. P. *esquire*, &c. *To the keeper of* ——— *I send you herewithal the body of* A. O. *late of* ——— *in the said county, labourer, brought before me this present day, and charged with the felonious taking and carrying away forty sheep, the property of* ——— *which also he hath confessed upon his examination before me* [by which he is not bailable]: *Therefore these are on the behalf of our said lord the king to command you, that immediately you receive the said* A. O. *and him safely keep in your said gaol, until that he be thence delivered by the due order of law. Hereof fail you not, as you will answer for your contempt at your peril. Given under my hand and seal at* ——— &c.

Or thus, in the king's name.

Westmorland. GEORGE *the second by the grace of god, of* Great Britain, France, *and* Ireland, *king, defender of the faith, and so forth: To the keeper of our gaol at* ——— *in our said county of* W. *or to his deputy, greeting: Whereas* A. O. *late of* ——— *in our said county, yeoman, is arrested for suspicion of felony by him, as it is said, committed, in feloniously taking and carrying away* ——— *of the value of* ——— *the property of* ——— *We therefore command you, and each of you, that you receive him the said* A. O. *into your custody in our said gaol, or that one of you do receive him, there to remain till he be delivered from your custody, according to the law of our kingdom of*

England. *Witness* J. P. *esquire, one of the justices assigned to keep the peace in our said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in our said county committed, at* ——— *in the said county, the* ——— *day of* ——— *in the* ——— *year of our reign.*

General warrant of commitment.

Westmorland. J. P. *esquire, one of the justices of our lord the king, assigned to keep the peace within the said county, To the constable of* ——— *in the said county, and to the keeper of* ——— *at* ——— *in the said county.*

These are to command you the said constable, in his majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said ——— *the body of* A. O. &c. *And you the said keeper are hereby required to receive the said* A. O. *into your custody in the said* ——— *and him there safely to keep* &c. *Given under my hand and seal, the* ——— *day of* ——— *in the* ——— *year of the reign of his said majesty king* George *the second.*

Common. (Nusance by digging holes therein.)

See Highways.

Common prayer.

Impugners of the book of common prayer.

1. IMpugners of the form of worship in the church of *England*, established by law, and contained in the book of common prayer; of the 39 articles; of the rites and ceremonies of the church; and of episcopal government; shall be excommunicated *ipso facto*, and not restored but by the bishop or archbishop on their repentance. *Can.* 5, 6, 7.

Ministers derogating from the book of common prayer.

2. If any parson, vicar, or other minister, that ought to use the common prayer, or to minister the sacraments, shall refuse to do the same, or (wilfully standing in the same) shall use any other form, or shall speak any thing in derogation of the same book or of any thing therein contained; he shall, on conviction, for the first offence forfeit to the king one year's profit of all his spiritual promotions, and be imprisoned for six months; for the second offence, shall be deprived of all his spiritual promotions, and be imprisoned for a year; and for the third offence, shall be deprived of all his spiritual promotions, and be imprisoned during life. And if he has no spiritual promotion, he shall for the first offence be imprisoned for a year; and for the second offence, during life. 1 *El. c.* 2. *s.* 4—8.

But this shall not restrain the spiritual court, from proceeding against these offenders; and they may be deprived by the said court,

court, according to the course of the spiritual law, for the first offence. *id. s.* 16, 23. 1 *Haw.* 9.

3. If any person whatsoever shall in plays, songs, or by other open words, speak any thing in derogation of the same book, or any thing therein contained; or shall by open fact cause or procure any minister in any place to say common prayer openly, or to minister any sacrament, in other form; or shall interrupt or let any minister to say the said common prayer; he shall (being indicted for the same at the next assizes) forfeit to the king for the first offence 100 marks, and for the second 400 marks; (which if not paid in 6 weeks after conviction, he shall suffer 6 months imprisonment for the first offence, and 12 months for the second;) and for the third offence shall forfeit all his goods and chattels, and be imprisoned during life. 1 *El. c.* 2. *s.* 9, 10, 11, 12, 13, 20.

Any person depraving the book of common prayer.

4. Where an incumbent resides upon his living, and keeps a curate, the incumbent himself (not having lawful impediment to be allowed by the bishop) shall at least once a month openly and publickly read the common prayer, and (if there be occasion) administer the sacraments, and other rites of the church; on pain of 5 *l.* to the poor, on conviction by confession, or oath of two witnesses, before two justices; and in default of payment in ten days, the same to be levied by the churchwardens or overseers by distress and sale, by warrant of such justices. 13 & 14 *C.* 2. *c.* 4. *s.* 7.

Resident incumbent to read the common prayer once a month.

Confession.

CONFESSION is twofold, either *express*, or *implied*.

An *express* confession is, where a person directly confesses the crime with which he is charged; which is the highest conviction that can be. 2 *Haw.* 333.

But it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 2 *H. H.* 225.

An *implied* confession is, where a defendant in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine; which submission the court may accept of if they think fit, without putting him to a direct confession. 2 *Haw.* 333.

It seems that the confession of the defendant taken upon an examination before justices of the peace, or in discourse with private persons, may be given in evidence against the party confessing, but not against others. 2 *Haw.* 429.

All those who on their examination own themselves guilty of a felony alledged against them, and are charged in their *mittimus* with the felony so confessed, seem to be excluded from bail; for bail is only proper where it stands indifferent whether the party be guilty or innocent. 2 *Haw.* 97.

Conies. See Game.
Conjuration. See Witchcraft.

Conspiracy.

I. What it is.
II. How punishable.

I. What it is.

By the common law.

1. BY the common law there can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal; as where divers persons confederate together by indirect means to impoverish a third person, or falsly and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter whether it be true or false. 1 *Haw.* 190.

By statute.

2. And conspiracy by statute is as follows: *Conspirators are they, that do confederate or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsly and maliciously to indict, or cause to indict, or falsly to move or maintain pleas; and such as retain men in the country, with liveries or fees to maintain their malicious enterprises; and this extendeth as well to the takers, as to the givers: And stewards and bailiffs of great lords, who by their office or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves.* 33 Ed. 1. st. 2.

From this definition of conspirators, it seems clearly to follow, contrary to the opinion of Lord *Coke*, that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsly and maliciously, whether they do any act in prosecution of such conspiracy or not. 1 *Haw.* 189. L. *Raym.* 1169.

But an *action* will not lie for the conspiracy, unless it be put in execution; for in such case, the *damage* is the ground of the action. L. *Raym.* 378.

Also it plainly appears from the words of the statute, that one person alone cannot be guilty of conspiracy, within the purport of it; from whence it follows, that if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the acquittal of the rest, is the acquittal of that one also: And upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and wife only, because they are esteemed but as one person in law. But it is certain, that an action on the case, in the nature of a conspiracy, may be brought against one only: Also, it hath been resolved, that if such an action

tion be brought againſt ſeveral perſons, and all but one be acquitted, yet judgment may be given againſt that one only. 1 *Haw.* 192.

Alſo in the caſe of *K.* againſt *Kinnerſley and Moore*, *T.* 5 *G.* An information was brought, ſetting forth that the defendants, being evil diſpoſed perſons, in order to extort money from my lord *Sunderland*, did conſpire together to charge my lord with endeavouring to commit ſodomy with the ſaid *Moore*. The defendant *Kinnerſley* only appears, and pleads to iſſue, and is found guilty. And now exception was taken in arreſt of judgment, that to every conſpiracy there muſt be two perſons at leaſt, whereas here is only one brought in and found guilty, and the other poſſibly may be acquitted. But it was anſwered, that this is arguing from what has not happened, and probably never will; for tho' *Moore* may have an opportunity to acquit himſelf, and is not concluded by the verdict as *Kinnerſley* is, yet as the matter now ſtands, *Moore* himſelf is found guilty, for the conſpiracy is found as it is laid, and therefore judgment may be given againſt one, before the trial of the other. And a caſe was quoted, where ſeveral were indicted for a riot, *with many others*, and two only were found guilty; and it was objected, that there muſt be three to make a riot; but upon the words, *with many others*, judgment was given againſt the defendants. And the court overruled the exception. And the defendant had ſentence. And in the *Eaſter* term following, *Moore* alſo was convicted and had judgment. *Str.* 193.

And, *E.* 18 *G.* 2. *K.* againſt *Eliz. Niccols.* She was indicted for conſpiring with *Tho. Bygrave*, unjuſtly to charge *William Frankland* with a robbery, and for that purpoſe going before a juſtice, where *Bygrave* ſwore it upon him. *Niccols* only came in, and pleaded not guilty. And the jury found that ſhe was guilty, but that *Bygrave* died before the indictment was preferred. Exception was taken, that one alone cannot be guilty of a conſpiracy, and here is but one convicted. But the court overruled this, on the authority of *Kinnerſley*'s caſe, in which caſe there was a poſſibility of contradictory verdicts, which here cannot be. *Str.* 1227.

II. How puniſhed.

1. It is clear, that thoſe who are convicted of conſpiracy at the ſuit of the party, ſhall have judgment of fine and impriſonment, and to render the plaintiff his damages. 1 *Haw.* 193. On action.

2. Alſo it is certain, that he who is convicted at the ſuit of the king, of a conſpiracy to accuſe another of a matter which may touch his life, ſhall have judgment that he ſhall loſe the freedom and franchiſe of the law (whereby he is diſabled from being put upon any jury, or to be ſworn as a witneſs, or even to appear in perſon in any of the king's courts), and alſo that his houſes, lands, and goods ſhall be ſeized into the king's hands, and his houſes and lands ſtripped and waſted, his trees rooted up, and his body impriſoned. And this is commonly called *villainous* judgment, and is given by the common law, and not by any ſtatute, and is ſaid On indictment or information.

generally in ſome books to be the proper judgment upon every conviction of conſpiracy at the ſuit of the king, without any reſtriction to ſuch as endangered the life of the party; but this point doth not ſeem to be any where ſettled. 1 *Haw.* 193.

In the caſe of *Kinnerſley* and *Moore* above-mentioned, *Kinnerſley* was fined 500*l.* a year's impriſonment, and to find ſureties for his good behaviour for 7 years. *Moore* was ſentenced to ſtand in the pillory, ſuffer a year's impriſonment, and to find ſureties for 7 years. *Str.* 196.

Conſtable.

THE office of a conſtable, in executing of warrants, is treated of under the titles Arreſt, and Warrant; and in like manner the other particulars of his duty may be found under the reſpective titles throughout the book; this title treating only of the office of a conſtable in general.

I. Of the antiquity and original of conſtables.
II. Who ſhall be a conſtable.
III. How choſen and ſworn.
IV. His power as a conſervator of the peace.
V. His duty as a ſubordinate officer to juſtices of the peace.
VI. His indemnity and protection in his office.
VII. Concerning the expences of his office.
VIII. Concerning his account and removal from his office.

I. Of the antiquity and original of conſtables.

Antiquity of conſtables in general.

1. The ſundry names of high conſtables, or conſtables of lathes, rapes, wapentakes, hundreds, and franchiſes; and the divers names alſo of petty conſtables, tythingmen, borſholders, boroheads, headborows, chief pledges, and ſuch other (if there be any) that bear office in towns, pariſhes, hamlets, tythings, or borows, are all in effect but two, that is to ſay, *conſtables* and *borſholders*. Lamb. Conſt.

The word *conſtable* hath afforded matter of much diſquiſition to the learned. It is evidently a compound; but from what two original words it hath ſprung, hath been variouſly conjectured. Hiſtory traceth it from its arrival in *England*, backwards through *France*, and *Germany*, and *Greece*, to the imperial ſeat at *Conſtantinople* in the days of *Conſtantine* the great. From whence we aſcend further ſtill towards the eaſt, where we find the word *cône*

or

or *cûne* in *Paleſtine*, which ſignified in the times of the old teſtament a ſtability, ſtrength, or ſtay. Of which word there ſeem to be ſome traces in the mongrel name of *Laocoon* at *Troy*; and more eſpecially of this ſame *Conſtantine*, who was himſelf of oriental extraction, having ſprung from *Dardania*, a country of the upper *Moeſia*, and was ſaid by his flatterers to have been deſcended from *Dardanus* and the *Trojans*. And perhaps this appellation of the emperor might give occaſion to the adopting of the word into the *Roman* language at that time. For it was then that the word *count* (the genuine offſpring of *cône* or *cûne)* firſt became a name of dignity, and from thence travelled weſtwards (with a little variation according to the genius of each language) throughout the provinces. Amongſt the *Saxons*, the word was *koning* or *kyninge*, from whence undoubtedly we received our *Engliſh* word *king*. Again, the word *ſtole*, *ſtalle*, *ſtaſie*, *ſtable*, by an eaſy tranſmutation of thoſe letters frequent in almoſt all languages (and which ſeemeth the other conſtituent of the word *conſtable)* is likewiſe common to thoſe languages of the middle ages, and ſignifieth a ſtanding place, diviſion, or department, called by the *Romans ſtatio*; and all of them probably from the ſame origin with the *Latin ſto*, and the ancient *Greek* word ϛαω. So that according to this etymology, the word *conſtable* will properly ſignify the ſtability or ſtay of the place, or the ſtrong man of the diviſion. The *German* word is *conneſtaſie*; the *French conneſtable*; the *Italian coneſtabile*; the *Spaniſh condeſtable*, from the word *conde* which they uſe for *count*. All which ſeem to be comprehended in the imperial denominations of the *Conſtantine* family, ſuch as *Conſtans*, *Conſtantius*, *Conſtantinus*, *Conſtantia*, *Conſtantina*, *Conſtantianus*, *Conſtantinacius*, and the like.

As touching *borſholders* (which is the other general name, and doth contain within it the meaning of tything-men, borowheads, headborows, thirdborows, and chief pledges) that is made up of the *Saxon borge*, *borrow*, or *borhoe*, a pledge, and *ealder*, the elder, chief or head; and *borſhealder* in one word doth mean the chief or head of the ſureties or pledges. For the underſtanding whereof, it is to be remembred, that by the ancient laws of this realm (before the coming in of king *William* the conqueror) it was ordained for the more ſure keeping of the peace, and for the better repreſſing of thieves and robbers, that all free born men ſhould caſt themſelves into ſeveral companies, by ten in each company; and that every of thoſe ten men of the company ſhould be ſurety and pledge for the forthcoming of his fellows: ſo that if any harm were done, by any of theſe ten, againſt the peace, then the reſt of the ten ſhould be amerced, if he of their company that did the harm ſhould fly, and were not forthcoming to anſwer to that wherewith he ſhould be charged. And for this cauſe, theſe companies are yet in ſome places of *England* called *boroes*, of the ſaid word *borge*, *borrow*, or *borhoe*, ſignifying a pledge or ſurety; and in other places they are called *tythings*, becauſe they contain (as hath been ſaid) the number of ten men with their families. And even as ten times ten do make an hundred, ſo becauſe it was then alſo appointed that ten of theſe companies

ſhould at certain times meet together for their matters of greater weight, therefore that general aſſembly, or court, was and yet is called a *hundred.* Furthermore, it was then alſo ordained, that if any man were of ſo evil credit, that he could not get himſelf to be received into one of theſe tythings or boroes, then he ſhould be ſhut up in priſon, as a man unworthy to live at liberty, amongſt men abroad. Now whereas every of theſe tythings or boroes did uſe to make choice of one man amongſt themſelves, to ſpeak and to do, in the name of them all; he was therefore in ſome places called the tythingman, in other places the boroes elder (whom we now call borſholder) in other places the borohead, or headborow, and in ſome other places the chief pledge, which laſt name doth plainly expound the other three that are next before it; for head or elder of the boroes, and chief of the pledges, are all one: and in ſome ſhires, where every third borow hath a conſtable, there the officers of the other two are called *thirdborows.* And in theſe tythings, or boroes, ſundry goods orders were obſerved; and amongſt others, firſt, that every man of the age of 12 years ſhould be ſworn to the king: Then, that no man ſhall be ſuffered to dwell in any town or place, unleſs he were alſo received into ſome ſuch ſuretiſhip and pledge as is aforeſaid: Thirdly, that if any of theſe pledges were impriſoned for his offence, then he ought not to be delivered without the aſſent of the reſt of his pledges: Again, that no man might remove out of one tything or boroe, to dwell in another, without lawful warrant in that behalf: Laſtly, that every of theſe pledges ſhould yearly be preſented and brought forth by their chief pledge, at a general aſſembly for that purpoſe, which we yet in remembrance thereof do call the *view of frankpledge,* or the leet court. *Lamb. Conſt.*

Some ſmall ſhadow of which antiquity we ſeem ſtill to retain in a common phraſe in drinking, when a man ſays to another that he will *pledge* him; which is ſaid to have begun when the *Danes* lorded it in this land; and the meaning was, to exhort the perſon to drink freely, for that the other would be ſurety to him that no one ſhould do him any bodily harm whilſt he was drinking.

Alſo we do ſtill retain the word *borrow* as a verb in our language, ſignifying to take money upon pledge or ſurety.

Antiquity of high conſtables.

2. By the ſtatute of *Winchſter, In every hundred and franchiſe two conſtables ſhall be choſen to make the view of armour; and they ſhall preſent defaults of armour, and of ſuits of towns, and of highways, and ſuch as lodge ſtrangers in uplandiſh towns, for whom they will not anſwer.* 13 Ed. 1. ſt. 2. c. 6.

And from hence Lord *Coke,* and others, will have it, that high conſtables are no ancienter than this ſtatute: But Mr. *Hawkins* (agreeably with *Lambard, Dalton,* and other authorities) ſays, that it ſeems to be the better opinion, that both conſtables of hundreds, which are commonly called high conſtables, and alſo conſtables of tythings, which are at this day commonly called petty conſtables, or tythingmen, were by the common law, and not

not firſt ordained by the ſaid ſtatute of *Wincheſter*; for that ſtatute doth not ſay, that there ſhall be ſuch officers conſtituted, but clearly ſeems to ſuppoſe that there were ſuch before the making of it. 2 *Haw.* 61.

In ſhort, the truth of the matter ſeems to be this: The far greateſt part of the buſineſs of high conſtables at this day, is not at all appropriated to them, as high conſtables; but only as officers to execute the precepts of the juſtices of the peace, which any other perſon may do as well as they. The original and proper authority of an high conſtable, as ſuch, ſeems to be the very ſame, and no other within his hundred, as that of the petty conſtable within his vill; and therein moſt probably, he is coeval with the petty conſtable. The other uſual branches of his office, ſuch as the ſurveying of bridges, the iſſuing precepts concerning the appointing of overſeers of the poor, ſurveyors of the highways, aſſeſſors and collectors of the land tax and window duties, and in like manner the viewing of armour by the abovementioned ſtatute, are in him, not of neceſſity, but as matter of convenience, and it is diſcretionary in the juſtices whom they will appoint to be their officers in theſe caſes; others have been ſuper-added to their office, for the like reaſon of convenience, by ſundry acts of parliament, ſuch as the iſſuing precepts for the licenſing of alehouſes, for levying the county rates, and for returning liſts of jurors; for that one perſon can do all the ſame much eaſier and cheaper, than ſo many different perſons.

II. Who ſhall be a conſtable.

1. It hath been ſaid, that a cuſtom in a town, that the inhabitants ſhall ſerve the office of conſtable by turns, according to the ſituation of their ſeveral houſes, is not good; for that by ſuch a courſe, it may come to a woman's turn to be conſtable, as inhabitant of one of thoſe houſes; yet we find ſuch cuſtoms allowed to be good in later books; and it ſeems, that the conſequence of the reaſoning abovementioned may well be denied, ſince a woman in ſuch caſe may procure another to ſerve for her. 2 *Haw.* 63. Women.

2. Apothecaries in *London*, and within ſeven miles thereof, being free of the company of apothecaries; and alſo thoſe in the country who have ſerved ſeven years apprenticeſhip, ſhall be exempted from the office of conſtable. 6 & 7 *W.* *c.* 4. Apothecaries.

3. Alſo it ſeems certain, that if a ſworn attorney, or other officer, of the courts at *Weſtminſter*, be choſen into this office, he may have a writ of privilege for his diſcharge, by reaſon of his neceſſary attendance in thoſe courts: And it hath been reſolved, that ſuch officers ſhall have this privilege, not only where there is no ſpecial cuſtom concerning the election of conſtables, but alſo where they are choſen by a particular cuſtom, in reſpect of their eſtates, or otherwiſe; for that no ſuch cuſtom ſhall be intended to be more ancient than the uſages of thoſe courts, and therefore ſhall give way to them. 2 *Haw.* 63. Attornies.

4. And upon the like reaſons, it is taken for granted, that practiſing barriſters at law, and the ſervants of members of parliament, Barriſters at law, ſervants to members of parliament.

liament, have the same privilege; but there seem to have been no resolutions to this purpose. 2 *Haw.* 63.

Alderman of London.

5. Also it hath been resolved, that an alderman of *London*, for the like reasons, is not compellable to be a constable. 2 *Haw.* 63.

Captain of the guards.

6. But it hath been holden, that a captain of the king's guards, being presented to serve as constable, in pursuance of a custom in respect of his lands in a town, cannot claim this privilege; for that notwithstanding he is bound by his office to personal attendance on the king's person, yet such office being of late institution, shall not prevail against an ancient custom. 2 *Haw.* 63.

Physician.

7. Also it seems, that a practising physician, being chosen constable in pursuance of such custom, has no remedy for his discharge; for that there are no precedents of this kind, and his calling is private. 2 *Haw.* 63.

But by the 32 *H.* 8. *c.* 40. The president, commons and fellows of the faculty of physick in *London*, shall not be chosen constables.

Where there are others sufficient

8. Yet if such an officer as before mentioned, or a gentleman of quality who hath no such office, or a practising physician, be chosen constable of a town, which hath sufficient persons besides to execute this office, and no special custom concerning it; perhaps he may be relieved by the king's bench: but it seems that even a custom cannot exempt fitting persons from serving the office of constable, where there are not sufficient besides them to execute it. But these points seem not to be settled. 2 *Haw.* 63.

Dissenting teachers.

9 By the 1 *W.* *c.* 18. *s.* 11. Every teacher or preacher in holy orders, or pretended holy orders, in a congregation tolerated by law, shall from the time of his subscription and taking the oaths, be exempted from the office of constable.

Prosecutors of felons.

10. And by 10 & 11 *W.* *c.* 23. *s.* 2, 3. The prosecutor of a felon to conviction, or person to whom he shall assign the certificate thereof, shall be discharged from the office of constable.

Whether he may appoint a deputy.

11. Inasmuch as the office of a constable is wholly ministerial, and no way judicial, it seems, that he may appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence, or otherwise, he cannot do it himself; yet it doth not seem to be settled, that a constable can make a deputy, without some special cause. 2 *Haw.* 62.

And the superior must be answerable for his deputy, upon any miscarriage; unless the deputy is duly allowed and sworn; for then he is constable. *Wood* 145.

Dissenters appointing a deputy.

12. And by 1 *W.* *c.* 18. *s.* 7. If any person dissenting from the church of *England*, shall be chosen constable, and shall scruple to take upon him the office, in regard of the oaths, or any other matter required to be done in respect of such office; he may execute it by a sufficient deputy by him to be provided, to be allowed by such persons, and in such manner, as such officer should have been allowed.

III. How choſen and ſworn.

1. It being ſaid in ſome books, that both high and petit conſtables are to be choſen and appointed by the ſheriff in his torn (or by the lord of the leet); and by others, that they are to be choſen by the decennary, it ſeems difficult to determine, to whether of them the power of chuſing doth of right belong. *2 Haw.* 62. By whom to be choſen.

2. Yet it ſeems clear, that whether a conſtable be to be choſen by the ſheriff, or decennary, yet he is to be ſworn and placed in his office by the ſheriff, as being judge of the court (or by the lord of the leet). *2 Haw.* 62. By whom to be ſworn.

3. Alſo it ſeems certain, that a cuſtom for chuſing a conſtable either way is good; and it ſeems to have been the opinion of the makers of the act of 13 & 14 *C.* 2. hereafter following, that the lords of the courts leet have this power of common right, and conſequently the ſheriff in his torn, where there is no court leet. *2 Haw.* 63. Cuſtom of chuſing.

4. But now the uſual manner is, that the high conſtables of hundreds be choſen either at the ſeſſions, or by the greater number of the juſtices of the diviſion; and likewiſe that they be ſworn at ſeſſions, or by warrant from the ſeſſions; which courſe hath been often allowed and commended by the juſtices of aſſize. *Dalt. c.* 28. Chuſing high conſtables.

And the reaſon thereof may be this, as hath been intimated above; namely, that their office at preſent doth not ſo much conſiſt in executing the office of high conſtable as ſuch, as in executing the juſtices precepts, which they may do for the moſt part, whether they be indeed high conſtables or not.

5. And moreover, every petty conſtable, being a principal peace officer, and it being neceſſary for the preſervation of the peace, that every vill ſhould be furniſhed with one; the juſtices of the peace have ever ſince the inſtitution of their office, taken upon them as conſervators of the peace, not only to ſwear the petty conſtables, which have been choſen at a torn or leet, but alſo to nominate and ſwear thoſe who have not been choſen at any ſuch court, on the neglect of the ſheriffs or lords to hold their courts, or to take care that ſuch officers are appointed in them. And this power of juſtices of the peace having been confirmed by the uninterrupted uſage of many ages, ſhall not now be diſputed, but ſhall be preſumed to have been grounded on ſufficient authority. And ſome have carried this point ſo far, as to allow the juſtices at their ſeſſions, to ſwear one who was choſen at the leet, and unduly rejected by the ſteward, who had ſworn another in his place. *2 Haw.* 65. Petty conſtables appointed by juſtices of the peace.

6. However it is certain, that juſtices of the peace had power to nominate and ſwear conſtables, on the default of the torn or leet, before the ſtatute of 13 & 14 *C.* 2., *c.* 12. and therefore, that they have ſuch authority in ſome caſes not mentioned in that ſtatute; which enacts, that if a conſtable ſhall die, or go out of the pariſh, or continue above a year in his office, any two juſtices Where the leet ſhall make default.

ſtices may make and ſwear a new one, until the lord ſhall hold a leet, or till the next ſeſſions, who ſhall approve of the officer ſo made and ſworn, or appoint another. 2 *Haw.* 65.

Mandamus to compel the ſwearing a conſtable.

7. And it ſeems to be clear at this day, that the king's bench hath power by *mandamus* to compel the court or judge to ſwear a conſtable duly choſen. 2 *Haw.* 65.

Conſtable refuſing to be ſworn.

8. Conſtables lawfully choſen, if they ſhall refuſe to be ſworn, a juſtice of the peace may bind them over to the aſſizes or ſeſſions. *Dalt. c.* 28.

How puniſhed.

9. But it ſeemeth that the ſheriff, or ſteward of the leet, cannot lawfully commit them for ſuch refuſal, without more; but it is ſaid, that if the party be preſent in the court, he may be fined; and that if he be abſent, and have a certain time and place appointed him by the ſheriff or ſteward, for the taking of the oath before a juſtice of the peace, and have alſo expreſs notice of ſuch appointment, and be preſented at the next court, for having refuſed to take it accordingly, he may be amerced: alſo it ſeems, that in either caſe he may be indicted (A) either at the aſſizes or ſeſſions. And it is adviſable in all pleadings, in any action concerning ſuch a fine or amercement, and in all indictments for ſuch refuſal, ſpecially and expreſly to ſet forth the manner of every ſuch election, appointment, notice, and refuſal, and before whom the court was holden: and it hath been adjudged, that it is inſufficient to ſay in general, that the party was duly elected, or lawfully elected, or that he had notice, without ſetting forth the ſpecial circumſtances thereof. Alſo it is ſaid to have been adjudged, that an indictment for not finding a ſufficient perſon to ſerve the office of conſtable, without ſhewing that the party refuſed to ſerve it himſelf, is inſufficient. 2 *Haw.* 64.

Conſtable's oath.

10. There is a long form of a conſtable's oath in *Dalton*, which is adopted by Mr. *Barlow*, expreſſing his duty in many inſtances; but as that form nevertheleſs doth not contain the hundredth part of the conſtable's duty, nor indeed the moſt material inſtances of it, it may be more elegible (as no particular form is directed by any ſtatute) to ſwear him (B) to the due execution of his office in general, than to deſcend to thoſe particulars; leſt by mentioning ſome parts of his duty, and not others, he may be induced to think, that thoſe others are not ſo neceſſary.

Oaths of allegiance and ſupremacy.

11. By the 1 *G. ſt.* 2. *c.* 13. High conſtables are to take the oaths of allegiance, ſupremacy, and abjuration, and receive the ſacrament, as other perſons who qualify for offices; but petty conſtables are exempted.

IV. His power as a conſervator of the peace.

Conſtable a conſervator of the peace.

1. Every high and petty conſtable are by the common law conſervators of the peace. 2 *Haw.* 33. *Crom.* 6. *Dalt. c.* 1.

May commit for an affray in his preſence.

2. And therefore if any man ſhall make an affray or aſſault upon another in the preſence of the conſtable, or ſhall threaten to kill, beat, or hurt another, or ſhall be in a fury ready to break the peace; the conſtable may commit him to the ſtocks, or other ſafe cuſtody for the preſent, and after may carry him before a juſtice,

juſtice, or to gaol, until he ſhall find ſurety for the peace, which ſurety the conſtable himſelf may alſo take by obligation, to be ſealed and delivered to the king's uſe, and if the party will not find ſurety to the conſtable, he may impriſon the party until he ſhall do it. *Dalt. c.* 1.

3. But he may not require ſurety of the peace, unleſs the offence be upon his own view, and not if it be committed out of his ſight; for he cannot take any man's oath that he is afraid of death, becauſe he is not a judge of record; which is the reaſon that an obligation taken by him, ſhall be in his own name, and not in the king's name: and the ſame ſhall be certified at the ſeſſions of the peace. *Cro. Eliz.* 375, 376.

But not when he is abſent.

V. His duty as a ſubordinate officer to juſtices of the peace.

It hath been always holden, that the conſtable is the proper officer to a juſtice of the peace, and bound to execute his warrants; and therefore it hath been reſolved, that where a ſtatute authorizes a juſtice of the peace to convict a man of a crime, and to levy the penalty by warrant of diſtreſs, without ſaying to whom ſuch warrant ſhall be directed, or by whom it ſhall be executed, the conſtable is the proper officer to ſerve ſuch warrant, and indictable for diſobeying it. 2 *Haw.* 62.

Subordinate to the juſtices of the peace.

VI. His indemnity and protection in his office.

1. If an action is brought againſt a conſtable, for any thing done by virtue of his office; he, and alſo all others which in his aid, or by his command, ſhall do any thing concerning his office, may plead the general iſſue, and give the ſpecial matter in evidence, and if he recovers, he ſhall have double coſts. 7 *J. c.* 5.

Double coſts.

2. And ſuch action ſhall be laid in the county where the fact was committed, and not elſewhere. 21 *J. c.* 12.

Proper county.

3. Formerly the conſtable was bound to take notice of the juriſdiction of the juſtice; inſomuch that if the juſtice iſſued a warrant in any matter wherein he had no juriſdiction, the conſtable was puniſhable for the execution of it: but now, by the ſtatute of 24 *G.* 2. *c.* 44. it is enacted;

No action if he delivers a copy of the warrant.

That no action ſhall be brought againſt any conſtable, or other perſon acting by his order, and in his aid, for any thing done in obedience to the warrant of a juſtice of the peace, until demand hath been made, or left at the uſual place of his abode, by the party, or by his attorney, in writing, ſigned by the party demanding the ſame, of the peruſal and copy of ſuch warrant, and the ſame hath been refuſed or neglected for ſix days after ſuch demand: and if after compliance therewith, any ſuch action ſhall be brought, without making the juſtice who ſigned ſuch warrant defendant, on producing and proving ſuch warrant at the trial, the jury ſhall give their verdict for the defendant, notwithſtanding any defect of juriſdiction in the juſtice. And if ſuch action be brought jointly againſt the juſtice and conſtable; on proof of ſuch

warrant,

warrant, the jury ſhall find for the conſtable, notwithſtanding ſuch defect of juriſdiction as aforeſaid; and if the verdict be given againſt the juſtice, the plaintiff ſhall recover his coſts againſt him, to be taxed in ſuch manner by the proper officer, as to include ſuch coſts as the plaintiff is liable to pay to ſuch defendant, for whom ſuch verdict ſhall be found as aforeſaid. *ſ.* 6.

Note; By this it ſeemeth, that the conſtable ought not to return the warrant to the juſtice, but to keep it for his own juſtification; for he cannot grant to the party the peruſal of the warrant, unleſs he hath it: but he muſt certify to the juſtice what he hath done in the execution thereof.

No action but within 6 months.

4. And no action ſhall be brought againſt any conſtable, but within ſix months after the act committed. 24 *G.* 2. *c.* 44. *ſ.* 8.

Conſtable aſſaulted need not go back to the wall.

5. And if the conſtable is aſſaulted in the execution of his office, he need not go back to the wall, as private perſons ought to do; and if in the ſtriving together, the conſtable kills the aſſailant, it is no felony; but if the conſtable is killed, it ſhall be conſtrued premeditated murder. *Hale's Pl.* 37. 1 *H. H.* 457.

VII. Concerning the expences of his office.

Charges of making diſtreſs.

1. By the 27 *G.* 2. *c.* 20. The conſtable executing a juſtice's warrant, for levying a penalty, or other ſum of money directed by any act of parliament, by diſtreſs, may deduct his own reaſonable charges of taking, keeping, and ſelling the goods diſtrained; returning the overplus on demand, after ſuch penalty or ſum of money and charges deducted.

Charges of conveying an offender to gaol.

2. A perſon committed to gaol, for any miſdemeanor, ſhall bear his own charges (if able) for conveying or ſending him to the ſaid gaol, and the charges of thoſe that guard him thither: and if he ſhall refuſe at the time of commitment to defray the ſame, or ſhall not then pay the ſame, the juſtice committing him, ſhall by warrant to the high or petty conſtable where the perſon ſhall inhabit, or from whence he ſhall be committed, or where he ſhall have any goods within the county, order ſo much to be ſold thereof, as by his diſcretion ſhall ſatisfy the ſame; the appraiſement to be made by four honeſt inhabitants. 3 *J.* *c.* 10. *ſ.* 1.

And if he have not money nor goods within the county, ſufficient to bear the charges of himſelf and of thoſe who convey him to the gaol, or houſe of correction, the conſtable may make application to a juſtice, who may upon oath examine into and aſcertain the reaſonable expences, and ſhall by his warrant (without fee) order the treaſurer to pay the ſame; except in *Middleſex*, where the ſame ſhall be paid by the overſeers of the pariſh where the perſon was apprehended. 27 *G.* 2. *c.* 3.

Charges about vagrants.

3. And by the 13 & 14 *G.* 2. *c.* 12. it is enacted, that whereas conſtables may be at great charge in relieving, conveying with paſſes, and in carrying rogues, vagabonds, and ſturdy beggars to the houſe of correction, and have no power to make rates to reimburſe themſelves; therefore the ſaid conſtables, together with the churchwardens and overſeers, and other inhabitants ſhall make a rate in like manner as the poor rate by the 43 *El.* *c.* 2.

which

which being confirmed under the hands and ſeals of two juſtices, may be levied by diſtreſs.

Mr. *Nelſon* and Mr. *Shaw* ſay, that this rate may be made for the purpoſe abovementioned, and for *other pariſh charges*; and direct five different forms of inſtruments to compel the payment thereof, ſetting forth therein generally, that the rates are to be made and levied for reimburſing the conſtable's neceſſary charges in the execution of his office. But there ſeems to be no ſuch power given by the ſtatute; for it is limited to expences about vagrants only; and even that ſeems to be rendred uſeleſs, by the vagrant act of 17 *G.* 2. which orders the ſaid expences to be paid out of the general county rate.

Neither is any ſuch power given by any other ſtatute; which indeed is hard upon the conſtable. It is but reaſonable, that the juſtices ſhould have power given by ſome act of parliament, to allow to the conſtable in all caſes a competent ſatisfaction for his trouble: for there ſeemeth to be no cauſe, why a conſtable who hath himſelf been guilty of no crime, ſhould be at much trouble and expence about thoſe who have, and have no compenſation for it.

VIII. Concerning his account and removal from his office.

1. The high conſtables ſhall at the general or quarter ſeſſions, if thereunto required, account for the general county rate by them received; on pain of being committed to gaol until they ſhall account; and ſhall pay over the money in their hands, according to the order of the ſaid court, on the like pain: And all their accounts and vouchers ſhall, after having been paſſed at the ſaid ſeſſions, be depoſited with the clerk of the peace, to be kept amongſt the records, and inſpected by any juſtice without fee. 12 *G.* 2. *c.* 29. *ſ.* 8. Account.

2. And in ſuch manner as conſtables are to be choſen, in the ſame manner, and by the like authority are they to be removed; ſo as if there ſhall be cauſe to remove and put an high conſtable from his place, it hath not been thought fit, that any one or two juſtices ſhould do it upon their diſcretion, but that it ſhould be done by the greater part of the juſtices of that diviſion, and that for ſome juſt cauſe; or elſe that it be done at the ſeſſions *Dalt. c.* 28. Removal.

And it ſeems clear, that the ſheriff, or ſteward of the leet, having power to place a conſtable in his office, have by conſequence a power of removing him. 2 *Haw.* 63.

And alſo the juſtices of the peace have always uſed, for good cauſe, to diſplace all ſuch conſtables, as have been choſen and ſworn by them. 2 *Haw.* 65.

And by the 13 & 14 *C.* 2. *c.* 12. If a conſtable ſhall continue above a year in his office, the ſeſſions may diſcharge him, and put another in his place, till the lord ſhall hold a leet. *ſ* 15.

And if the court, or other judge, ſhall refuſe to diſcharge a conſtable, the king's bench may compel them by *mandamus*. 2 *Haw.* 65.

A. Indict-

A. Indictment for not taking the office.

THE *jurors for our lord the king upon their oath present, that* A. O. *late of* ——— *in the township of* ——— *in the said county, yeoman, on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *and long before, and always after until the day of the preferring of this indictment, was and is an inhabitant and residing within the township of* ——— *aforesaid in the county aforesaid, and an able person to serve the office of constable for the same township; and he the said* A. O. *on the said* ——— *day of* ——— *in the year aforesaid, in the township aforesaid, lawfully and in due manner was elected and chosen by* ——— *ancient inhabitants of the same township, according to the ancient custom of chusing constables for the said township, into the office of constable for the said township of* ——— *in the said county, for one year from thence next following, to do and execute all and singular those things which belong to the office of constable; and that the said* A. O. *afterwards, to wit, on the* ——— *day of* ——— *in the year aforesaid, at the township of* ——— *aforesaid in the county aforesaid, had due notice thereof, and then and there was required to appear before* J. P. *esquire, then and yet one of his majesty's justices assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, on the said* ——— *day of* ——— *in the year aforesaid, to take his oath for the due executing the said office of constable for the same township, according to the duty of that office; nevertheless the said* A. O. *his duty in that behalf not regarding, but contriving and intending wholly to neglect to serve the said office of constable, after he the said* A. O. *was so elected and chosen into the said office as aforesaid, to wit, on the said* ——— *day of* ——— *in the year aforesaid, and continually afterwards until the day of taking this inquisition, at the township aforesaid in the county aforesaid, unlawfully and contemptuously did refuse, and still doth refuse, to take his said oath for the due executing the said office of constable, and in any wise to execute the same office, to the great hindrance of justice, in contempt of our said lord the king, and to the evil example of all others in the like case offending, and against the peace of our said lord the king.*

B. Constable's oath.

YOU *shall well and truly serve our sovereign lord the king,* [*and the lord of this leet,* if sworn in a court leet] *in the office of constable, for the township of* ——— *for the year ensuing* [or, *until you shall be lawfully discharged therefrom*; or, *until another shall be sworn in your place:*] *You shall well and truly do and execute all things belonging to the said office, according to the best of your skill and knowledge: So help you god.*

Conviction.

THE power of a juſtice of the peace is in reſtraint of the common law, and in abundance of inſtances is a tacit repeal of that famous clauſe in the great charter, that a man ſhall be tried by his equals; which alſo was the common law of the land long before the great charter, even for time immemorial, beyond the date of hiſtories and records. Therefore generally nothing ſhall be preſumed in favour of the office of a juſtice of the peace; but the intendment will be againſt it. Therefore where a ſpecial power is given to a juſtice of the peace by act of parliament, to convict an offender in a ſummary manner, without a trial by jury, it muſt appear that he hath ſtrictly purſued that power; otherwiſe the common law will break in upon him, and level all his proceedings. Therefore where a trial by jury is diſpenſed withal, yet he muſt proceed nevertheleſs according to the courſe of the common law in trials by juries, and conſider himſelf only as conſtituted in the place both of judge and jury. Therefore there muſt be an information or charge againſt a perſon; then he muſt be ſummoned or have notice of ſuch charge, and have an opportunity to make his defence; and the evidence againſt him muſt be ſuch as the common law approves of, unleſs the ſtatute ſpecially directeth otherwiſe; then, if the perſon is found guilty, there muſt be a conviction, judgment, and execution, all according to the courſe of the common law, directed and influenced by the ſpecial authority given by ſtatute; and in the concluſion, there muſt be a *record* of the whole proceedings, wherein the juſtice muſt ſet forth the particular manner and circumſtances, ſo as if he ſhall be called to account for the ſame by a ſuperior court, it may appear that he hath conformed to the law, and not exceeded the bounds preſcribed to his juriſdiction.

The difficulty of drawing up a conviction in due form, hath induced the legiſlature to inſtitute a more apt and compendious method in divers inſtances; and it were to be wiſhed, in eaſe of the juſtices, that this proviſion might be made more general. Theſe ſummary forms of convictions, which are ſpecially directed by act of parliament, are interſperſed throughout this book under the titles to which they do reſpectively belong.

Other forms of convictions, which are left at large according to the courſe of the common law (having no preſcriptive form of words directed by any act of parliament) are likewiſe drawn forth at length under divers titles; particularly, concerning ſuch matters as have been often controverted in the courts above, occaſioned either by the largeneſs of the penalties, or ſometimes by the greatneſs of the offenders; as in caſes of riots, forcible entries, deer ſtealing, and ſuch like.

It remaineth, under this title, to Inſert one general precedent or form of conviction for the whole; which may be to the effect following:

General form of conviction.

Westmorland. BE *it remembred, that on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *by the grace of god, of* Great Britain, France, *and* Ireland, *king, defender of the faith, and so forth, at* ——— *in the county of* ——— *aforesaid,* A. I. *of* ——— *cometh before me* J. P. *esquire, one of the justices of our said lord the king, assigned to keep the peace of our said lord the king in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed,* [*residing near to the place where the offence herein after mentioned was committed*; or as the statute requires] *and giveth me the said justice to understand and be informed, that one* A. O. *of* ——— *in the said county, yeoman, on the* ——— *day of* ——— *now last past, at* ——— *in the said county, did* [here set forth the fact, in the words of the statute as near as may be] *against the form of the statute in such case made and provided: And afterwards, upon the aforesaid* ——— *day of* ——— *in the year aforesaid, at* ——— *aforesaid, in the county aforesaid, he the said* A. O. *after being duly summoned in this behalf before me the justice aforesaid appeareth and is present, in order to make his defence against the said charge contained in the said information, and having heard the same, he the said* A. O. *is asked by me the said justice, if he can say any thing for himself, why he the said* A. O. *should not be convicted of the premisses above charged upon him in form aforesaid; who pleadeth that he is not guilty of the said offence. Nevertheless, on the day aforesaid, in the year aforesaid, at* ——— *aforesaid, in the county aforesaid, one credible witness, to wit,* A. W. *of* ——— *yeoman, cometh before me the justice aforesaid, and before me the same justice upon his oath on the holy gospel to him then and there by me the justice aforesaid administred, deposeth, sweareth, and on his oath aforesaid affirmeth and saith, that the aforesaid* A. O. *on the* ——— *day of* ——— *aforesaid, in the year aforesaid, at* ——— *aforesaid, in the county aforesaid, did* [here again set forth the fact, or so much thereof as is sufficient to convict the offender] *And thereupon the aforesaid* A. O. *the* ——— *day of* ——— *aforesaid, in the year aforesaid, before me the justice aforesaid, by the oath of one credible witness aforesaid, according to the form of the statute aforesaid is convicted; and for his offence aforesaid hath forfeited the sum of* ——— *of lawful money of* Great Britain, *to be distributed as the statute aforesaid doth direct. In witness whereof, I the said justice to this present record of the conviction as aforesaid, have set my hand and seal at* ——— *aforesaid, in the county aforesaid, the day and year first abovewritten.*

If he confesses the fact then say, ——— *And because the said* A. O. *hath nothing to say, nor can say any thing in his own defence touching and concerning the premisses aforesaid, but doth of his own accord freely and voluntarily acknowledge and confess all and singular the said premisses to be true, in manner and form as the same are charged upon him in the said information; and because all and singular the premisses being heard and fully understood by me the said justice, it manifestly appears to me* ——— Or, if the party hath been summoned,

moned, and doth not appear, then say,——*Whereupon, on the said* ——— *day of* ——— *in the year aforesaid, at* ——— *aforesaid, in the county aforesaid, he the said* A. O. *was duly summoned in this behalf, to appear before me, in order to make his defence against the said charge contained in the said information, but the said* A. O. *doth neglect to appear before me, and doth not appear, nor make any defence against the said charge as aforesaid; Therefore I the said justice, on the said* ——— *day of* ——— *in the year aforesaid, at* ——— *aforesaid, in the county aforesaid, do proceed to examine into the truth of the said complaint; And* A. W. *of* ——— *a credible witness, cometh before me the justice aforesaid, and before me the same justice upon his oath* &c.

Cometh before me] A conviction ought to be in the present tense, and not in the time past. L. *Raym.* 1376. *Str.* 608. *Roberts*'s case.

And giveth me to understand and be informed] A conviction ought to be on an information or complaint precedent. *M.* 11 *W. K.* and *Fuller.* L. *Raym.* 510.

That one A. O. *of* ——— *in the said county, yeoman,* &c.] All acts, which subject men to new and other trials, than those by which they ought to be tried by the common law, being contrary to the rights and liberties of Englishmen, as they were settled by *magna charta*, ought to be taken strictly; and the court of king's bench will require, that it do appear upon the face of such proceedings, that the fact was an offence within the act, and that the justices have proceeded accordingly. *M.* 1 *An. K.* and *Chandler.* 1 *Salk.* 378. L. *Raym.* 581.

Therefore the particular manner of the offence ought to be set forth. Thus in the case of swearing, before the legislature by the act of the 19 *G.* 2. had directed a summary form of words for the conviction, it was required not only to set forth that the person had cursed or sworn in general, but the particular oaths and curses were to be set forth, that the court might judge thereupon, whether they were indeed oaths and curses or not. *H.* 8 *G. K.* and *Sparling. Strange* 497.

And in the case of *K.* and *Roberts, M.* 11 *G.* which was a conviction for swearing 150 oaths in these words *by god*, and cursing 150 curses in these words *god damn you*, this matter was carried so far, that it was insisted this was not sufficient, but that the oaths and curses ought to have been set forth 150 times each. But the oaths and curses being all only in the same words over again, the court held the conviction good. *Str.* 608. L. *Raym.* 1376.

And it seemeth, that a conviction on a penal statute ought expresly to shew, that the defendant is not within any of its provisoes; for since no plea can be admitted to such a conviction, and the defendant can have no remedy against it, but from an exception to some defect appearing in the face of it, and all the proceedings are in a summary manner, it is but reasonable that such a conviction should have the highest certainty, and satisfy the court,

that the defendant had no ſuch matter in his favour, as the ſtatute it ſelf allows him to plead. 2 *Haw.* 250.

But in the caſe of *K.* and *Ford*, *T.* 9 *G.* There was a conviction on the 3 *C. c.* 3. for keeping an alehouſe without licence; and it was objected, that in the act there is a proviſo to exempt perſons who have been puniſhed by the former law of the 5 & 6 *Ed.* 6. *c.* 25. and therefore it ſhould have been ſaid, he had not been proceeded againſt upon that act; But by the court, That coming in by way of proviſo, he ſhould have inſiſted on it in his defence; it appears he was aſked what he had to ſay, and therefore we may reaſonably preſume he had no ſuch defence to make. And the conviction was confirmed. *Strange* 555.

And in the caſe of *K.* and *Bryan*, *M.* 12 *G.* 2. The defendant was convicted on the gin act; and an exception was taken, that there was no averment, that it was not ſold to be uſed in medicine: and the caſes on the game act were mentioned, where in convictions it is neceſſary to exclude all the qualifications for killing game. On the other hand, it was inſiſted, that the reaſon of that was, becauſe thoſe were in the enacting clauſe, whereas this about medicine comes in by way of proviſo, and is by way of defence to be ſhewn on the defendant's part: And for that purpoſe was cited, *M.* 11 *G. K.* and *Theed*; where in a conviction for obſtructing an exciſe officer on the 8 *An. c.* 9. it was objected, that it not being averred to be in the day, it ſhould have been ſhewn that there was a conſtable preſent, which is made neceſſary in the night; but was held to be well, and its being in the night, ſhould have been ſhewn on the defendant's part. And by the court, This is brought within the general enacting clauſe: and the true diſtinction is, where the extenuation comes in by way of proviſo, or exception. And the conviction was confirmed. *Strange* 1101.

Being duly ſummoned] *T.* 11 *G. K.* and *Venables*. The court were unanimouſly of opinion, that the party ought to be heard, and for that purpoſe ought to be ſummoned in fact; and that if the juſtices proceeded againſt a perſon without ſummoning him, it would be a miſdemeanor in them, for which an information would lie. L. *Raym.* 1406.

And in the caſe of *K.* and *Allington*, *H.* 12 *G.* On affidavit that no ſummons was had, the court granted an information againſt the juſtice who made the conviction. *Strange* 678.

H. 6 *G. K.* and *Johnſon*. The defendant was convicted for keeping a gun. And exception was taken, that there was not a *reaſonable* ſummons; for it was made to appear the ſame day, which might be impoſſible upon account of the diſtance, or the ſummons being ſerved late, and his witneſſes might not be got together on ſo ſhort a warning: then it was to appear *at the pariſh aforeſaid*, whereas there were two pariſhes mentioned before; ſo the man might have gone to one, whilſt they were convicting him at the other. It was anſwered, that the defendant appeared at the time, and made defence; ſo that cures

all

all defects in the ſummons. And by the court, The anſwer is right. *Strange* 261.

H. 3 *G. K.* and *Simpſon.* The defendant was convicted for deer ſtealing; and the conviction ſet forth, that he had been ſummoned to appear before the juſtices, but it did not appear he ever was before them. Exception was taken to this, that as no appeal lies in this caſe, the juſtices ſhould not have proceeded in the abſence of the party, eſpecially where it may end in a corporal puniſhment, as it may do here for want of a diſtreſs. And at another day, on conſideration, *Parker* Ch. J. delivered the reſolution of the court: We are all of opinion, the offender may be convicted, without appearing. The ſtatute is ſilent as to the method of proceeding, and the law of *England*, it is true, in point of natural juſtice, always requires the party charged with any offence, to be heard before he be condemned in judgment; but that rule muſt have this exception, unleſs it is through his own default: were it otherwiſe, every criminal might avoid conviction. *Strange* 44.

But, generally, it is not neceſſary to *ſet forth the ſummons in the conviction*; for although no ſummons is ſet forth, yet the court will intend one: but where a ſummons is ſet forth, and that ſummons appears to be irregular, the court will quaſh the conviction, there being then no room to intend any other ſummons. 11 *G. K.* and *Venables. Seſſ. C. V.* 1. 210. L. *Raym.* 1405.

One credible witneſs, to wit, A. W. *of* ——— *yeoman*] It is requiſite to name the witneſs, that it may appear he is not the ſame perſon who was the informer; for an informer who hath a ſhare of the penalty, is never allowed to be a witneſs, unleſs in caſe where a ſtatute ſhall ſpecially ſo direct it.

On his oath aforeſaid affirmeth and ſaith] In all convictions, being in the nature of judgments, the whole evidence ought to be ſet forth, or at leaſt ſo much thereof as is ſufficient to warrant the conviction; that the court of king's bench may judge of the ſufficiency thereof: but otherwiſe it is in orders, which are authoritative. And ſo it was laid down in the caſe of *K.* and *Floyd, M.* 8 *G.* 2. which was thus; A motion was made to quaſh an order of ſeſſions, made under the ſtatute of the 1 *W. c.* 21. *ſ.* 6. whereby the defendant was adjudged guilty *upon full proof* of the charge againſt him, and that he be diſcharged from his office of clerk of the peace, upon the objection that the evidence is not ſet out: But it was adjudged after conſideration, that this was an order, and therefore the evidence need not be ſhewn; but that it would be otherwiſe if it was a conviction. *Andr.* 82. *Str.* 996.

M. 5 *G.* 2. *K.* and *Theed.* A conviction on the candle act was quaſhed, becauſe the evidence was not ſet out; it being only alledged, that the offence was *fully and duly proved. Strange* 919. *Andr.* 84.

T. 6 *G. K.* and *Baker.* A conviction for taking pilchards, againſt the form of the ſtatute, quaſhed; becauſe the witneſs ſwears generally that the defendant *is guilty of the premiſſes*, and that is taking upon himſelf to ſwear the law. *Strange* 316.

M. 11 *W. K.* and *Fuller.* A conviction ought to be certain, and not taken upon collection. L. *Raym.* 510.

And for his offence aforesaid hath forfeited] *H.* 3 *G.* 2. *K.* and *Hawks.* A conviction for killing a deer was quashed, because it was only ——— *he is convicted,* without any judgment of forfeiture. *Strange* 858.

To be distributed as the statute aforesaid doth direct] *M.* 9 *An. K.* and *Barret.* A conviction for deer stealing did set forth, that ——— *he is convicted, and shall forfeit* 30 l. *according to the form of the statute,* without making a distribution, which ought to be 10 *l.* to the informer, 10 *l.* to the party grieved, and 10 *l.* to the poor. But by the court, This is well enough; for by the statute he is only to forfeit in case he has goods, which is conditional, and not absolute. 1 *Salk.* 383.

Note; On a suggestion that the defendant hath a title to the thing in question, a prohibition will be granted by the king's bench, before or after conviction, to stay the justice from proceeding; for without doubt if the defendant have but a colour of title, the justices have no jurisdiction in the cause, as where the defendant was convicted for cutting trees, where he had a right of common. L. *Rrym.* 901.

Corn.

For the forestalling, ingrossing, or regrating of corn; see title Forestalling.

I. The measure of corn.
II. Licensing badgers of corn.
III. The offences of cutting corn growing, and of burning stacks of corn.
IV. Exportation of corn.
V. Importation of corn.

I. The measure of corn.

Buying corn in the sheaf without measuring.

1. TO buy or sell corn in the sheaf, before it is threshed and measured, is against the common law of *England*; and the reason thereof seemeth to be, for that by such sale the market is in effect forestalled. 3 *Inst.* 197.

Penalty of selling otherwise than by Winchester measure.

2. If any person shall sell corn otherwise than by *Winchester* measure, sealed and stricken by the brim, he shall forfeit 40 *s.* on conviction before one justice, on the oath of one witness; to be levied

levied by the churchwardens and overſeers, or ſome of them, to the uſe of the poor, by diſtreſs and ſale. In default of diſtreſs, impriſonment till paid. 22 *C.* 2. *c.* 8. *ſ.* 2.

And if any mayor, or other head officer, ſhall knowingly permit the ſame, he ſhall, upon conviction thereof at the county ſeſſions, forfeit 5 *l.* half to the proſecutor, and half to the poor, by diſtreſs and ſale; for want of diſtreſs, to be impriſoned by warrant of the juſtices, till payment be made. *ſ.* 3.

Further penalty.

3. And moreover, every perſon who ſhall ſell or buy corn, without meaſuring, being thereunto required, or in any other manner than is by the 22 *C.* 2. *c.* 8. directed, and that without ſhaking of the meaſure by the buyer, he ſhall, beſide the penalty of that act, forfeit all the corn ſo bought or ſold, or the value thereof, to the party complaining. 22 & 23 *C.* 2. *c.* 12. *ſ.* 2.

And on complaint made to a juſtice of the peace, that corn hath been bought, ſold, or delivered contrary to this act, the proof ſhall lie upon the defendant, to make it appear by the oath of one witneſs, that he ſold or bought the ſame lawfully; wherein if he ſhall fail, he ſhall forfeit as is ſaid before, to be levied by diſtreſs and ſale; which ſhall by the juſtice be diſtributed, half to the poor, and half to the informer. 22 & 23 *C.* 2. *c.* 12. *ſ.* 3.

Difference of meaſures.

4. But notwithſtanding all the ſtatutes that have been made, for the uniformity of meaſures throughout the realm, yet the meaſure of corn differs in many places, the buſhel being greater in one place than in another. And altho' regularly, a cuſtom or preſcription againſt a ſtatute is void, except it be confirmed by the ſtatute, or ſaved by another ſtatute; yet it is ſaid, that in the meaſure of corn, the cuſtom of the place is to be obſerved, if it be a cuſtom beyond all memory, and uſed without any viſible interruption. *Barl.* 578.

II. Licenſing badgers of corn.

Who may be licenſed to be a badger.

1. No badger, lader, kidder, carrier, buyer, or tranſporter of corn or grain ſhall be licenſed (A) but only ſuch who is or hath been a married man, and is an houſholder, and not an houſhold ſervant, nor retainer to any perſon, and of the age of 30 years at the leaſt. 5 *El.* *c.* 12. *ſ.* 4.

In ſeſſions only.

2. And he ſhall be licenſed only in the open ſeſſions of the ſhire where he hath dwelt for three years laſt paſt. 5 *El.* *c.* 12. *ſ.* 4.

Date and ſigning.

3. Which licence ſhall bear date of the day and place where the ſeſſions is holden, and ſhall be ſigned and ſealed, by three juſtices at ſuch ſeſſions, one being of the *quorum.* 5 *El.* *c.* 12. *ſ.* 5.

Recognizance to purſue the licence.

4. And the juſtices at ſuch ſeſſions may take recognizance (B) that the perſon licenſed ſhall not by colour thereof foreſtall or ingroſs, or do any thing contrary to the act againſt foreſtalling, ingroſſing, and regrating, of the 5 & 6 *Ed.* 6. *c.* 14. 5 *El.* *c.* 12. *ſ.* 6.

Fee to the clerk of the peace.

5. And the licence and recognizance ſhall be written by the clerk of the peace, or his deputy, and no other perſon; for which, he ſhall have 12 *d.* for the licence, and 8 *d.* for the recognizance, and for regiſtring them both 4 *d.* For which fee, he

ſhall alſo keep a regiſter book, and therein enter the names and dwelling places of the perſons licenſed, with a brief declaration of the licence, and of the day, time, and place when granted: which book he ſhall have at the ſeſſions. 5 *El. c.* 12. *ſ.* 6.

How long the licence ſhall continue.

6. And ſuch licence ſhall be only of force for one year. 5 *El. c.* 12. *ſ.* 4.

Penalty of being licenſed otherwiſe.

7. Any perſon taking licence contrary hereto, ſhall forfeit to the king 5 *l.* and the licence ſhall be void. 5 *El. c.* 12. *ſ.* 5.

Not to buy out of the market.

8. And no perſon, by authority of ſuch licence, ſhall buy corn out of open fair or market, to ſell again, unleſs he be thereunto particularly licenſed, and have ſpecial and expreſs words in the licence, that he may ſo do; on pain of 5 *l.* half to the king, and half to him that will ſue. 5 *El. c.* 12. *ſ.* 7.

Seſſions may determine.

9. And the ſeſſions may hear and determine the offences aforeſaid, by inquiſition, preſentment, bill, or information, and by examination of two witneſſes, and make proceſs thereupon, as upon indictment, and eſtreat the king's moiety, and award execution of the other moiety to the party, by *fieri facias*, or *capias*, as the courts at *Weſtminſter* may do. 5 *El. c.* 12. *ſ.* 8.

Not to extend to corporations.

10. But nothing of all this ſhall extend to prejudice the liberty of a city, or town corporate, but that they may licence purveyors for the proviſion thereof, as before this act. 5 *El. c.* 12. *ſ.* 9.

Not to extend to certain counties.

11. Alſo it is provided, that this ſhall not extend to the counties of *Weſtmorland*, *Cumberland*, *Lancaſter*, *Cheſter*, and *York*; but that they may do as heretofore they have lawfully uſed to do. 5 *El. c.* 12. *ſ.* 10.

But by a general clauſe in the ſtatute of the 13 *El. c.* 25. *ſ.* 20. theſe other counties ſeem now to be included; which enacts, that no perſon or perſons (without any exception as to particular counties) ſhall be a buyer, badger, kidder, or carrier of corn in other manner than is contained in the ſtatute made in the 5 *El. c.* 12. nor ſhall be any other ways admitted or licenſed to be a buyer, badger, kidder, or carrier as aforeſaid, than is mentioned and appointed by the ſaid ſtatute.

III. The offences of cutting corn growing, and of burning ſtacks of corn.

Cutting corn growing.

1. Every perſon who ſhall unlawfully cut or take away any corn or grain growing, being convicted thereof by confeſſion, or oath of one witneſs, before one juſtice, ſhall for the firſt offence pay ſuch damages as the juſtice ſhall appoint: and if the juſtice ſhall think him not able or ſufficient, or if he do not pay ſuch damages, he ſhall commit him to the conſtable where the offence is committed, or where the party is apprehended, to be whipped; and for every other offence he ſhall in like manner be whipped. The conſtable refuſing, ſhall be committed by the juſtice, till he conform. 43 *El. c.* 7.

But if he cut it at one time, and then come again at another time and take it away, it is felony. 1 *Hawk.* 93.

Burning corn in the night.

2. If any perſon ſhall, in the night time, maliciouſly and willingly burn or cauſe to be burnt, any rick or ſtack of corn, he ſhall be

be guilty of felony: but to avoid judgment of death, he may make his election to be transported for seven years. And three justices (1 Q.) may determine the same. 22 & 23 C. 2. c. 7.

3. But by the 9 G. c. 22. commonly called the Black act, which is inserted more at large in the title of that name, and which by the last continuance is to be of force till Sep. 1. 1757, &c. If any person shall set fire to any mow or stack of corn, he shall be guilty of felony without benefit of clergy. s. 1. Burning by night or day.

And the hundred shall answer the damages, not exceeding 200 l. s. 7, 8, 9, 10.

And if any person shall apprehend, or cause to be convicted, such offender, and shall be killed, or wounded so as to lose an eye, or the use of any limb, in apprehending or endeavouring to apprehend such offender, on proof thereof at the sessions, and certificate thereof from thence, the sheriff shall pay to the person intitled the sum of 50 l. in 30 days, to be repaid to him out of the treasury. s. 12.

IV. Exportation of corn.

1. The king may at any time, by proclamation, prohibit the exportation of corn generally, or out of any special ports by name, for such time as shall be therein limited. 1 J. c. 25. s. 27. The king may prohibit by proclamation.

2. No duty or subsidy whatsoever shall be paid on the exportation of wheat, rye, barley, malt, beans, pease, or other grain, bread, biscuit, or meal. 11 & 12 W. c. 20. s. 4. Duty on exportation taken off.

3. But when malt or barley are at or under 24 s. a quarter, rye 32 s. wheat 48 s. every person exporting the same in English shipping, shall have from the officers of the customs, for every quarter of barley or malt exported (ground or unground) 2 s. 6 d. of rye 3 s. 6 d. of wheat 5 s. 1 W. c. 12. And of wheat malt 5 s. 5 An. c. 29. s. 15. Bounty on exportation.

And by 5 An. c. 8. art. 6. & ch. 29. s. 10. when oats do not exceed 15 s. a quarter, a bounty of 2 s. 6 d. a quarter shall be paid for oatmeal exported.

4. And if any person shall wilfully and maliciously beat, wound, or use any other violence to any person, with intent to hinder him from buying corn in any market or other place; or shall unlawfully stop or seize upon any waggon, cart, or other carriage, or horse, loaded with wheat, flour, meal, malt, or other grain, in or on the way to or from any city, market town, or sea port, and wilfully and maliciously break, cut, separate, or destroy the same, or any part thereof, or the harness of the horses drawing the same; or shall unlawfully take off, drive away, kill, or wound any of such horses; or unlawfully beat or wound the driver; or shall by cutting of the sacks, or otherwise, scatter or throw abroad such wheat, flour, meal, malt, or other grain, or shall take and carry away, spoil, or damage the same, or any part thereof: every such person, being convicted thereof, before two justices or the sessions, shall be sent to the gaol or house of correction, for any time not exceeding three months, nor less than one month, and be once publickly and openly whipped by the master of such gaol Penalty of hindring exportation.

or

or houſe of correction, in ſuch city, market town, or ſea port, in or near which the offence ſhall be committed, on the firſt convenient market day, at the market croſs, or market place there, between the hours of 11 and 2. 11 *G.* 2. *c.* 22 *ſ* 1.

And if any ſuch perſon ſo convicted, ſhall commit any of the offences aforeſaid a ſecond time; or if any perſon ſhall wilfully and maliciouſly pull down, throw down, or otherwiſe deſtroy any ſtorehouſe, or granary, or other place where corn ſhall be then kept in order to be exported; or ſhall unlawfully enter any ſuch ſtorehouſe, granary, or other place, and take and carry away any corn, flour, meal, or grain therefrom, or otherwiſe ſpoil or damage any meal, flour, wheat, or grain therein, intended for exportation: every perſon ſo offending, and being thereof lawfully convicted, ſhall be adjudged guilty of felony, and be tranſported for ſeven years. *ſ.* 2, 3.

And the hundred ſhall be liable to anſwer damages (not exceeding 100 *l.*), to be ſued for and levied as in caſes of robbery; the perſon injured giving notice of the offence in two days, by himſelf or ſervant, to a conſtable of the hundred, or the conſtable of the place in or near which the fact ſhall be committed; and within ten days after ſuch notice, giving in the examination on oath of himſelf, or of his ſervant preſent at the time of the fact, or having the care of ſuch his property, before a juſtice of the peace, whether he knows the perſons that committed the fact, or any of them; and if he confeſſes that he does, then the perſon ſo confeſſing, entring into recognizance to proſecute. 11 *G.* 2. *c.* 22. *ſ.* 5, 6.

But if an offender is convicted in 12 months, the hundred ſhall not be liable; and therefore the action muſt not be brought till after one year: nor ſhall it be commenced but within two years. *ſ.* 7, 8.

Note; It is proper here to take notice of a very odd miſtake in ſome of the books, relating to an act made in the 14 *G.* 2. *c.* 3. by reaſon of which act one author aſſerts, that the ſtatute laſt recited is of little uſe, becauſe that now by the ſaid ſtatute of 14 *G.* 2. *no corn can be exported:* and another ſays, that by the ſaid ſtatute of 14 *G.* 2 *no corn ſhall be exported after Dec.* 15. 1741. And the miſtake is no other than this; that inſtead of *after* Dec. 15. the ſtatute ſays, *before* Dec. 15. 1741, none ſhall be exported; and the reaſon was, becauſe at that time there was great ſcarcity of corn in the nation. To which may be added, that other books take no notice of either the one act or the other; perhaps from the above ſuppoſition, that the one act renders the other uſeleſs: by which it may ſeem, that the publiſhers of the new editions do not always bring down the alterations from the ſtatutes themſelves, but quote from one another.

V. Importation of corn.

Poundage on importation.

1. When corn doth not exceed the following prices, the cuſtom and poundage for corn imported ſhall be as follows: wheat not above 53 *s.* 4 *d.* a quarter, ſhall pay 16 *s.* if above 53 *s.* 4 *d.* and not

not above 4*l.* it shall pay 8*s.* rye not above 40*s.* a quarter, shall pay 16*s.* barley and malt not above 32*s.* a quarter, shall pay 16*s.* buck wheat not above 32*s.* a quarter, shall pay 16*s.* oats not above 16*s.* a quarter, shall pay 5*s.* 4*d.* pease or beans not above 40*s.* a quarter, shall pay 16*s.* 22 *C.* 2. *c.* 13. *s.* 1.

But when the prices exceed these rates, then the duties payable before this act, shall only be paid, *id. s.* 2. That is to say, for every quarter of wheat imported, 5*s.* 4*d.* of rye 4*s.* barley or malt 2*s.* 8*d.* buck wheat 2*s.* oats 1*s.* 4*d.* pease or beans 4*s.* 15 *C.* 2. *c.* 7. *s.* 3.

Price of corn how to be ascertained.

2. And that it may be known what price corn bears where such foreign corn is imported, the justices of the peace for the counties where foreign corn is imported, shall at every their quarter sessions give in charge to the grand jury to make enquiry and presentment upon their oaths, of the common market prices of the several sorts of middling *English* corn, as the same shall be commonly bought and sold in the county; which presentment shall be certified by the justices to the chief officer and collector of the customs at the port where the corn is imported, to be hung up in some publick place in the custom house. But this shall not extend to the city of *London.* 5 *G.* 2. *c.* 12. *s.* 1, 2, 3, 4.

Fraudulent importation.

3. And for preventing the fraudulent importation of foreign corn, no warrant shall be allowed for carrying forth to sea, to any other port, any foreign corn after importation; and no person shall carry forth the same, or procure it to be shipped for that purpose, on pain of forfeiting the same, and also 20*s.* for every bushel, and also the ship, with all her guns, tackle, and furniture; half to the king, and half to him who shall sue in any court of record. And the master and mariners, knowingly assisting therein, shall be imprisoned for three months. 5 *G.* 2. *c.* 12. *s.* 5.

A. Licence for a badger of corn.

Westmorland. AT *the general quarter sessions of the peace held at* ——— *for the county aforesaid, the* ——— *day of* ——— *We* A. B. C. D. *and* E. F. *esquires, justices of the peace for the said county (one whereof is of the* quorum) *have licensed, and by these presents do license and admit* G. H. *of* ——— *being upwards of* 30 *years of age, and also being a married man, and an householder, and having been an inhabitant in the said county, for three years last past, to be a common badger, carrier, buyer, and seller of corn and grain in any market or fair whatsoever, and the same to convert into meal, and to carry to, and vend the same in any fair or market, from time to time, and at all times for and during the space of one whole year, from the date hereof; so as he do use and follow the said business, according to the true intent and meaning of the statutes in that case made and provided against regrators, forestallers, and ingrossers, and not otherwise. Given under our hands and seals the day and year first abovewritten.*

B. Con-

B. Condition of the recognizance.

——— *that he ſhall not foreſtall, or ingroſs, or do any thing contrary to the true meaning of the ſtatutes made againſt regrators, foreſtallers, and ingroſſers, or any thing therein contained.*

Coroner.

CORONERS are ancient officers by the common law, ſo called becauſe they deal principally with the pleas of the crown, and were of old time the principal conſervators of the peace. 2 *Haw.* 42.

Concerning whom I ſhall ſhew,

I. Who may be a coroner.
II. How choſen.
III. His power and duty in taking an inquiſition of death.
IV. His power and duty in other matters.
V. His fees.
VI. Puniſhment for not doing his duty.

I. Who may be a coroner.

Dignity.

1. Of ancient time this office was of great eſtimation; for none could have it under the degree of a knight. 3 *Ed.* 1. *c.* 10. 4 *Inſt.* 271.

Eſtate.

2. And by the 14 *Ed.* 3. *ſt.* 1. *c.* 8. No coroner ſhall be choſen unleſs he have land in fee, ſufficient in the ſame county, whereof he may anſwer to all manner of people.

II. How choſen.

To be choſen in the county court.

1. The coroner (as of ancient time the ſheriffs and conſervators of the peace) ſhall be choſen in full county, that is, in the county court, by the commons of the ſame county. 28 *Ed.* 3. *c.* 6.

And this muſt be in purſuance of the king's writ for that purpoſe, iſſuing out of, and returnable into the chancery; and none but freeholders have a voice at ſuch election, for they only are ſuiters to the county court. 2 *Haw.* 43, 44.

County to anſwer for him.

2. And being elected by the county, if he be insufficient, and not able to anſwer ſuch fines and other duties in reſpect of his office, as he ought; the county, as his ſuperior, ſhall anſwer for him. 2 *Inſt.* 175.

3. And

3. And being chosen by the county, his office continues, notwithstanding the demise of the king. 4 *Inst.* 271. Office not void by the king's death.

4. And after he is chosen, he shall be sworn, by the sheriff, for the due execution of his office. 2 *Hale's H.* 55. To be sworn.

5. But in the statute of 28 *Ed.* 3. which enacts that they shall be chosen by the county, there is a saving to the king and other lords, who ought to make coroners, their franchises. Others not chosen by the county.

6. The lord chief justice of the king's bench, by virtue of his office, is the chief coroner of *England.* 2 *H. H.* 53. Chief Justice.

III. His power and duty in taking an inquisition of death.

1. When it happens that any person comes to an unnatural death, the township shall give notice thereof to the coroner. Otherwise, if the body be interred before he come, the township shall be amerced. *Hale's Pl.* 170. Notice.

2. And by *Holt* Ch. J. It is a matter indictable to bury a man that dies a violent death, before the coroner's inquest hath sat upon him. 2 *Haw. Not.* 8. Burying without notice.

3. And if the township shall suffer the body to lie till putrefaction, without sending for him, they shall be amerced. *Hale's Pl.* 170. 2 *Haw.* 48. Lying unburied.

4. When notice is given to the coroner, he is to issue a precept to the constables of the four or six next townships, to return a competent number of good and lawful men of their townships, to appear before him in such a place, to make an inquisition touching that matter. 2 *H. H.* 59. Or he may send his precept to the constable of the hundred. *Wood* 848. Precept to summon a jury.

5. These are to be at least 12; and it is said, that all persons of the neighbouring towns, above the age of 12 years, are bound to attend at the taking the inquisition, unless they have a reasonable excuse to the contrary. 2 *Inst.* 148. 2 *Haw.* 54. Jury.

6. If the constables make not a return, or the jurors returned appear not, their defaults are to be returned to the coroner; and the constables or jurors in default shall be amerced before the judges of assize. 2 *H. H.* 59. Default in not appearing.

7. The jury appearing is to be sworn and charged by the coroner to enquire, upon the view of the body, how the party came by his death. 2 *H. H.* 60. Swearing and charge.

8. For he can take indictments of death, only upon view of the body, and not otherwise; therefore if the body be interred before he come, he must dig it up. And this he may do lawfully, within any convenient time, as in 14 days. *Hale's Pl.* 170. 2 *Haw.* 48. View of the body.

9. If the body cannot be viewed, the coroner can do nothing; but the justices of the peace shall inquire thereof. *Hale's Pl.* 170. 2 *Haw.* 48. Where the body cannot be viewed.

10. The jury being sworn, and the body upon view, he shall inquire upon the oaths of them, in this manner, by the statute of 4 *Ed.* 1. *st.* 2. called the statute *de officio coronatoris*; *viz.* Form of the charge, where a person is slain.

If they know where the perſon was ſlain; whether it were in any houſe, field, bed, tavern, or company:

Who are culpable, either of the act, or of the force; and who were preſent, either men or women, and of what age ſoever they be, if they can ſpeak, or have any diſcretion:

And how many ſoever be found culpable, they ſhall be taken and delivered to the ſheriff, and ſhall be committed to the gaol;

And ſuch as be found, and be not culpable, ſhall be attached until the coming of the judges of aſſize.

Where a perſon ſlain is found in the fields or woods.

11. And, by the ſame ſtatute, if it fortune any ſuch man be ſlain, which is found in the fields, or in the woods, firſt it is to be inquired, whether he was ſlain in the ſame place or not:

And if he were brought and laid there, they ſhall do ſo much as they can to follow their ſteps that brought the body thither, whether he were brought upon a horſe, or in a cart:

It ſhall be alſo inquired, if the dead perſon were known, or elſe a ſtranger, and where he lay the night before.

Wounds.

12. Alſo, by the ſame ſtatute, all wounds ought to be viewed, the length, breadth, and deepneſs; and with what weapons; and in what part of the body the wound or hurt is; and how many be culpable; and how many wounds there be; and who gave the wound.

Defendants evidence.

13. And they muſt hear evidence on all hands, if it be offered to them, and that upon oath, becauſe it is not ſo much an accuſation or an indictment, as an inquiſition or inqueſt of office. 2 *H. H.* 157.

To inquire of the murderer's lands and goods.

14. And by the aforeſaid ſtatute, if any be found culpable of the murder, the coroner ſhall immediately go to his houſe, and ſhall inquire what goods he hath, and what corn he hath in his graunge; and if he be a freeman, they ſhall inquire how much land he hath, and what it is worth yearly, and further, what corn he hath upon the ground: and likewiſe of his freehold, how much it is worth yearly, over and above the ſervice due to the lord of the fee; and the land ſhall remain in the king's hands, until the lords of the fee have made fine for it:

And when they have thus enquired upon every thing, they ſhall cauſe all the land, corn, and goods to be valued, in like manner as if they ſhould be ſold immediately; and thereupon they ſhall be delivered to the whole townſhip, which ſhall be anſwerable before the judges for all.

Perſons drowned or ſuddenly dead.

15. In like manner, by the ſaid ſtatute, it is to be inquired of them that be drowned, or ſuddenly dead, whether they were ſo drowned, or ſlain, or ſtrangled by the ſign of a cord tied ſtreight about their necks, or about any of their members, or upon any other hurt found upon their bodies. And if they were not ſlain, then ought the coroner to attach the finders, and all other in the company.

Flight.

16. He ſhall alſo inquire, whether the perſons found guilty, fled; for which flight they forfeit goods and chattels. 2 *Haw.* 48, 53.

17. And if any person be slain or murdered in the day time, and the murderer escape untaken, the township shall be amerced. 3 *H.* 7. *c.* 1. Township. amerced for an escape.

18. Concerning horses, boats, carts, and the like, whereby any are slain, which properly are called deodands, they also shall be valued, and delivered unto the towns as before. 4 *Ed.* 1. *st.* 2. Deodands.

19. All which things must be inrolled in the rolls of the coroner. 4 *Ed* 1. *st.* 2. Coroner's rolls.

20. And the sheriffs shall have counter rolls with the coroner, of things belonging to their office. 3 *Ed.* 1. *c.* 10. Sheriff's rolls.

21. But it is not necessary that the inquisition be taken in the very same place where the body was viewed; but they may adjourn to a place more convenient. 2 *Haw.* 48. Adjourning after view.

22. Immediately upon these things being inquired, the bodies of such persons being dead, or slain, shall be buried. 4 *Ed.* 1. *st.* 2. Burial.

23. By the 1 & 2 *P.* & *M.* *c.* 13. *s.* 5. Every coroner, upon any inquisition before him found, whereby any person shall be indicted for murder or manslaughter, or as accessary before the offence committed, shall put in writing the effect of the evidence given to the jury before him, being material; and shall bind over the witnesses to the next general gaol delivery to give evidence; and shall certify the evidence, the recognizance, and the inquisition or indictment before him taken and found, at or before the trial, on pain of being fined by the court. Certifying to the assizes.

By the express words of which statute, he may inquire of *accessaries before the fact*; but he cannot inquire of accessaries *after* the fact. 2 *Haw.* 48.

24. He ought also to inquire of the death of all persons who die in prison; that it may be known, whether they died by violence, or any unreasonable hardships: for if a prisoner, by the duress of the gaoler, comes to an untimely death, it is murder in the gaoler, and the law implies malice in respect of the cruelty. 3 *Inst.* 52, 91. Persons dying in gaol.

25. If the inquisition shall be quashed in the court of king's bench, the coroner by leave of the court may take up the body again, and take a new inquisition. *E.* 5 *G.* *K.* and *Saunders.* *Str.* 167. *M.* 9 *G.* Case of the coroner of *Wenlock.* *Str.* 533. Inquisition quashed in the court of king's bench.

IV. His power and duty in other matters.

1. He ought to inquire of treasure that is found; who were the finders, and likewise who is suspected thereof; and that may well be perceived, where one liveth riotously, haunting taverns, and hath done so of long time: hereupon he may be attached for this suspicion, by four, or six, or more pledges, if he may be found. 4 *Ed.* 1. *st.* 2. Treasure trove.

2. Besides his judicial place, he hath also an authority ministerial as a sheriff; namely, when there is just exception taken to the sheriff, judicial process shall be awarded to the coroner, for the execution of the king's writs: and in some special cases, the Executing process.

the king's original writ ſhall be immediately directed to him. 4 *Inſt.* 271.

Outlawry. 3. He is bound to be preſent in the county court, to pronounce judgment of outlawry upon the exigent, after *quinto exactus*, at the fifth court, if the defendant doth not appear. *Wood* 833.

Appeals. 4. He had anciently alſo a power in certain appeals, as of rape, and maim; which are now out of uſe.

V. His fees.

Fee of 13 s. 4 d. 1. By the ſtatute of 3 *H.* 7. *c.* 1. The coroner ſhall have for his fee, upon every inquiſition taken upon the view of the body ſlain, 13 *s.* 4 *d.* of the goods and chattels of him that is the ſlayer and murderer, if he have any goods; and if not, he ſhall have for his ſaid fee, of ſuch amerciaments as ſhall fortune any townſhip to be amerced for eſcape of ſuch murderer.

Fee of 20 s. and 9 d. a mile. 2. Moreover, by the 25 *G.* 2. *c.* 29. For every inquiſition (not taken upon view of a body dying in gaol) he ſhall have 20 *s.* and alſo 9 *d.* for every mile he ſhall be compelled to travel from his uſual place of abode to take ſuch inquiſition; to be paid by order of the juſtices in ſeſſions, out of the county rates; for which order no fee ſhall be paid. *ſ.* 1.

And for every inquiſition taken on view of a body dying in priſon, he ſhall be paid ſo much, not exceeding 20 *s.* as the juſtices in ſeſſions ſhall allow; to be paid in like manner. *ſ.* 2.

But no coroner of the king's houſhold, and of the verge of the king's palaces; nor any coroner of the admiralty; or of the county palatine of *Durham*; nor of the city of *London* and borough of *Southwark*, nor any franchiſes belonging to the ſaid city; nor of any city, town, or franchiſe, not contributing to the county rates, or within which ſuch rates have not been uſually aſſeſſed, ſhall be intitled to any benefit by this act; but they ſhall have ſuch fees and ſalaries as they were allowed before this act, or as ſhall be allowed by the perſons by whom they have been appointed. *ſ.* 5.

VI. His puniſhment for not doing his duty.

His puniſhment for neglect of duty. 1. Coroners concealing felonies, or not doing their duty thro' favour to the miſdoers, ſhall be impriſoned a year, and fined at the king's pleaſure. 3 *Ed.* 1. *c.* 9.

2. And by the 3 *H.* 7. *c.* 1. If any coroner be remiſs, and make not inquiſitions upon the view of the body dead, and certify the ſame to the gaol delivery; he ſhall forfeit to the king an hundred ſhillings.

3. And by the 25 *G.* 2. *c.* 29. If any coroner, not appointed by an annual election or nomination, or whoſe office is annexed to any other office, ſhall be convicted of extortion for taking more than his lawful fees, or of wilful neglect of his duty, or miſdemeanor in his office; the court may adjudge him to be amoved from

from his office; and thereupon, if he ſhall have been elected by the freeholders, a writ ſhall iſſue for the amoving him, and electing another in his ſtead; and if he hath been appointed by the lord of any liberty or franchiſe, or in any other manner than by the freeholders, the perſon intitled to nomination, ſhall on notice of ſuch judgment of amoval, nominate another perſon in his ſtead. *ſ.* 6.

4. And he ought to execute his office in perſon, and not by deputy; for he is a judicial officer. *Wood* 141. Otherwiſe it ſeemeth that he ſhall incur the aforeſaid penalties, for remiſſneſs or neglect of duty.

The coroner's precept to ſummon a jury.

Weſtmorland. { To the high conſtable of —— in the ſaid county.

THESE *are in the name of our ſovereign lord the king, to require you, immediately upon ſight hereof, to ſummon and warn* 24 *good and lawful men of the four next townſhips to* ——— *in the ſaid county, to be and appear before me* A. C. *gentleman, one of the coroners of the county aforeſaid, at* ——— *aforeſaid in the ſaid county, on the* ——— *day of* ——— *then and there to inquire of, do, and execute all ſuch things as on his majeſty's behalf ſhall be lawfully given them in charge. Whereof fail not, as you will anſwer the contrary at your peril. Given under my hand and ſeal, the* ——— *day of* ———.

The jurors oath on the coroner's inqueſt.

YOU *ſhall diligently inquire, and true preſentment make, on the behalf of our ſovereign lord the king, how and in what manner* A. D. (or, *a perſon unknown,* as the caſe is) *here lying dead, came to his death; and of ſuch other matters relating to the ſame as ſhall be lawfully required of you, according to your evidence: So help you god.*

After the foreman is ſworn, the reſt may be ſworn, three or four together, as follows;

Such oath as A. F. *the foreman of this inqueſt hath for his part taken, you and every of you ſhall well and truly obſerve and keep on your parts reſpectively: So help you god.*

Inquiſition of murder.

Weſtmorland. AN *inquiſition indented, taken at* ——— *in the county of* ——— *aforeſaid, the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *before me* A. C. *gentleman, one of the coroners of our lord the king, for the county aforeſaid, upon the view of the body of* A. D. *then and there lying dead, upon the oaths of* A. B. C. D. E. F. *&c. good and lawful*

men of ——— aforesaid, and of three other of the next towns, to wit, K. L. *and* M. *in the said county, who being sworn and charged to inquire on the part of our said lord the king, when, where, how, and after what manner, the said* A. D. *came to his death, do say upon their oath, that one* A. M. *late of ——— aforesaid, gentleman, not having god before his eyes, but being moved and seduced by the instigation of the devil, on the ——— day of ——— in the ——— year of ——— aforesaid, at the first hour in the night of the same day, with force and arms, at ——— in the county aforesaid, in and upon the aforesaid* A. D. *then and there being in the peace of god and of the said lord the king, feloniously, voluntarily, and of his malice forethought, made an assault; and that the aforesaid* A. M. *then and there with a certain sword made of iron and steel, of the value of* 5 s. *which he the said* A. M. *then and there held in his right hand, the aforesaid* A. D. *in and upon the left part of the belly of the said* A. D. *a little above the navel of the said* A. D. *then and there violently, feloniously, voluntarily, and of his malice forethought, struck and pierced, and gave to the said* A. D. *then and there with the sword aforesaid, in and upon the aforesaid left part of the belly of the said* A. D. *a little above the navel of the said* A. D. *one mortal wound of the breadth of half an inch, and of the depth of three inches, of which said mortal wound the aforesaid* A. D. *then and there instantly died; and so the said* A. M. *then and there felonionsly killed and murdered the said* A. D. *against the peace of our said lord the king, his crown and dignity.*

And the said jurors further say, upon their oath aforesaid, that A. A. *of ——— yeoman, and* B. A. *of ——— yeoman, were feloniously present with drawn swords, at the time of the felony and murder aforesaid in form aforesaid committed, that is to say, on the said ——— day of ——— in the ——— year aforesaid, at ——— aforesaid in the county aforesaid, at the first hour in the night of the said day, then and there comforting, abetting, and aiding the said* A. M. *to do and commit the felony and murder aforesaid in manner aforesaid, against the peace of our said lord the king, his crown and dignity.*

And moreover, the jurors aforesaid, upon their oath aforesaid, do say, that the said A. M. A. A. *and* B. A. *had not, nor any of them had, nor as yet have or hath any goods or chattels, lands or tenements, within the county aforesaid, or elsewhere, to the knowledge of the said jurors.*

In witness whereof, as well the aforesaid coroner, as the jurors aforesaid, have to this inquisition put their seals, on the day and year aforesaid, and at the place aforesaid.

A. B.
A. C. *Coroner.* C. D.
E. F. *&c. jurors.*

An inquisition where one hangs himself.

——— As above to ——— *not having god before his eyes, but being seduced and moved by the instigation of the devil, at ——— aforesaid, in a certain wood at ——— aforesaid standing and*

being, the ſaid A. D. *being then and there alone, with a certain hempen cord of the value of* 3 d. *which he then and there had and held in his hands, and one end thereof he then and there put about his neck, and the other end thereof he tied about a bough of a certain oak tree, and himſelf then and there, with the cord aforeſaid, voluntarily and feloniouſly, and of his malice forethought, hanged and ſuffocated; and ſo the jurors aforeſaid, upon their oath aforeſaid ſay, that the ſaid* A. D *then and there in manner and form aforeſaid, as a felon of himſelf, feloniouſly, voluntarily, and of his malice forethought, himſelf killed, ſtrangled, and murdered, againſt the peace* &c.

An inquiſition where one drowns himſelf.

——— *at* ——— *aforeſaid, in the county aforeſaid, then and there being alone, in a common river there, called* ——— *himſelf voluntarily and feloniouſly drowned; And ſo the jurors aforeſaid, upon their oath aforeſaid ſay, that the aforeſaid* A. D. *in manner and form aforeſaid, then and there himſelf voluntarily and feloniouſly as a felon of himſelf killed and murdered; againſt the peace* ——— .

An inquiſition upon one who dies in gaol.

——— *who ſay upon their oath, that the aforeſaid* A. D. *on the day of the taking of this inquiſition, being a priſoner in the gaol at* ——— *in the county aforeſaid, then and there and of the viſitation of god, and then and there in manner and form aforeſaid came to his death, and not otherwiſe. In witneſs* &c.

An inquiſition on one *non compos mentis.*

——— *who ſay upon their oath, that the aforeſaid* A. D. *on the day and year aforeſaid, and at the time of his death, to wit, from the* ——— *day of* ——— *to the time of his death, and at the time of his death aforeſaid, was a lunatick, and a perſon of inſane mind; and that the ſaid* A. D. *being a lunatick and a perſon of inſane mind as aforeſaid, did on the* ——— *day of* ——— *come alone to a certain river, called* ——— *in the ſaid county, and did then and there caſt himſelf into the ſaid river, and drowned himſelf in the water of the ſaid river. And ſo the jurors aforeſaid, upon their oath aforeſaid ſay, that the aforeſaid* A. D. *from the cauſe aforeſaid, in manner and form aforeſaid, came to his death, and not otherwiſe. In witneſs* &c.

An inquiſition on one for cutting his throat.

——— *by the inſtigation of the devil, at* ——— *aforeſaid in the county aforeſaid, in and upon himſelf, then and there being in the peace of god and of the ſaid lord the king, feloniouſly, voluntarily, and of his malice forethought, made an aſſault; and that the aforeſaid* A. D. *then and there with a certain knife, of the value of*

one penny, which he the said A. D. *then and there held in his right hand, himself upon his throat then and there feloniously, voluntarily, and of his malice forethought did strike, and gave to himself then and there with the knife aforesaid, upon his throat aforesaid, one mortal wound, of the breadth of four inches, and the depth of one inch, of which said mortal wound the said* A. D. *at* ——— *aforesaid in the county aforesaid languished, and languishing lived, from the said* ——— *day of* ——— *in the* ——— *year aforesaid, to the* ——— *day of* ——— *and that the said* A. D. *on the* ——— *day of* ——— *aforesaid, in the* ——— *year aforesaid, at* ——— *aforesaid, in the county aforesaid, of that mortal wound died. And so the jurors aforesaid* &c.

For killing another in his own defence.

——— *upon their oaths say, that* A. K. *late of* ——— *gentleman, at* ——— *aforesaid in the said county, on the* ——— *day of* ——— *in the* ——— *year of* ——— *in the peace of god and of our said lord the king then being,* A. M. *late of* ——— *in the county of* ——— *at the hour of* ——— *in the afternoon of the same day, did come, and upon him the said* A. K. *then and there of his malice forethought did make an assault, and him the said* A. K. *did then and there endeavour to beat and kill, by continuing the assault aforesaid, from the house of one* W. H. *in* ——— *aforesaid to a certain place called* ——— *in the county aforesaid, and the said* A. K. *seeing that the said* A. M. *was so maliciously disposed, to a certain wall in the said place, called* ——— *did flee, and from thence for fear of death could not escape, and so the said* A. K. *himself, in preservation of his life, against the said* A. M. *continued to defend, and in his own defence him the said* A. M. *upon the right part of the breast of him the said* A. M. *with a certain sword of the price of one shilling, which the said* A. K. *then and there held in his right hand, did strike, then and there giving to the said* A. M. *one mortal wound, of the breadth of one inch and of the depth of three inches, of which said mortal wound the said* A. M. *at* ——— *aforesaid in the county aforesaid languished, and languishing lived from the said* ——— *day of* ——— *to the* ——— *day of* ——— *from thence next ensuing, and that the said* A. M. *on the said* ——— *day of* ——— *in the* ——— *year aforesaid, at* ——— *aforesaid in the said county, of that mortal wound died; And so the said* A. K. *did then and there kill him the said* A. M. *in his own defence.*

An inquisition where the murderer is unknown.

——— The same as before, only say ——— *that a certain person unknown* &c. and add ——— *And the said jurors upon their oath aforesaid further say, that the said person unknown, after he had committed the said felony and murder in manner aforesaid, did fly away: Against the peace* &c.

Cottage.

A Cottage (Sax. *Cote*) is a little house for habitation, without any land belonging to it. *Wood* 763.

By the 31 El. c. 7. *No person shall build any cottage for habitation, nor convert any building to be used as a cottage for habitation, unless he lay to the same four acres of ground at the least, according to the statute or ordinance* de terris mensurandis, *being his own freehold or inheritance lying near to the said cottage, to be continually occupied and manured therewith, so long as the same cottage shall be inhabited; on pain of* 10 l. *to the king.* s. 1.

And *every person who shall uphold and continue any such cottage, to be erected or converted for habitation, whereunto four acres shall not be laid to be occupied therewith, shall forfeit to the king* 40 s. *for every month.* s. 2.

And *there shall not be any inmate, or more families than one, dwelling in any one cottage; on pain that the owner or occupier shall forfeit to the lord of the leet* 10 s. *a month, who on presentment may levy the same by distress, or sue for it in any court of record.* s. 3.

And the justices of assize, justices of the peace in sessions, and every lord within his leet, and no others, may hear and determine all offences against this act, by indictment, or by presentment, or information, and award execution by fieri facias, elegit, capias, *or otherwise.* s. 4.

But this act shall not extend to any cottage in any city, town corporate, or ancient borough, or market town; nor to any cottages for workmen only, in any mineral works, coal mines, quarries, or delfs of stone or slate, or in making brick, tile, lime, or coals, so as they be not above one mile distant from the place of working. s. 5.

Also this shall not extend to any cottage within a mile of the sea, or on the side of a navigable river where the admiral ought to have jurisdiction, so long as no person shall inhabit therein, but a sailor, or man of manual occupation for furnishing any ship or vessel; nor to any cottage to be made in any forest, chase, warren, or park, so long as no other person shall therein inhabit, but an under keeper or warrener; nor to any cottage heretofore made, so long as no other person shall therein inhabit, but a common herdman or shepherd, for keeping the cattle or sheep of the town, or a poor, lame, sick, aged, or impotent person; nor to any cottage to be made, which for any just respect, on complaint to the assizes or sessions, shall by their order be decreed to continue for habitation, so long only as by such decree shall be limited. s. 6.

And by the 43 *El. c.* 2. *The churchwardens and overseers, by consent of the lord of the manor, may erect cottages on the wastes and commons, for the habitation of the poor, but for no other purpose.* s. 5.

No person shall build any cottage for habitation] An indictment for erecting a cottage contrary to the statute, was quashed; because it was not said that any inhabited it: for if it was not inhabited, it was no offence. 1 *Ventr.* 107.

According to the statute or ordinance de terris mensurandis] That is, after 16½ foot to the pole. 2 *Inst.* 737.

Being his own freehold or inheritance] Therefore neither grounds holden by copy, or for life or lives, or for any number of years will serve: and it must be freehold, either in fee simple, or fee tail. 2 *Inst.* 737.

Justices of assize, justices of the peace in sessions, and every lord within his leet] So that there is a concurrent power in every of these three; and the judgment of such one of them as doth first enquire of, hear, and determine the same, shall stand. 2 *Inst.* 739.

Nor to any cottage heretofore made] That is, erected before the making of this act.

Finally, Lord *Coke* observing upon this act of the 31 *El.* says, The inconveniences that grow by unlawful cottages against this statute are great; being nests to hatch idleness. the mother of pickings, thieveries, stealing of wood, and the like; tending also to the prejudice of lawful commoners, for that new erected cottages within the memory of man, tho' they have four acres of ground, or more, laid to them, according to this act, ought not to common in the wastes of the lord; but the greatest inconvenience of all is, the ill breeding and educating of youth; which inconveniences may be easily helped and remedied, by the provisions of this excellent law, if lords of leets and their stewards would look to the execution of this act, which (he says) he holds to be the readiest means; for albeit the cottage erected, or converted, cannot by any provision in this statute be demolished, or pulled down, yet the execution of the penalty of this act will make it uninhabitable, and work the desired effect. And they may also be amerced, for wrongful commoning, in the court baron. 2 *Inst.* 740.

Counterfeit. See Coin, Cheat, Forgery.

County court.

County, 1. ANCIENTLY, the *comites*, *counts*, or *earls*, had the government of the counties; and afterwards the *vice-comites* or *sheriffs*. And the *county* seemeth to be nothing else, but the district of the *comes* or *count*. *Shire* is a *Saxon* word, from *scyran*, to share or divide, for that the shires or counties are divided

divided by certain metes and bounds from each other. And the *sheriff*, in *Saxon scyregerefa*, is the *reve*, *grave*, or governor of the *shire*; wherein he hath great power, being therein the chief officer under the king.

2. The sheriff holdeth in his county two courts; the *torn*, and the *county court*: The *torn* is the king's court of record, for criminal causes, and for redressing of common grievances within the county; the *county court* is not a court of record, but only a court baron, for civil causes, and this is the court of the sheriff himself. County court.

3. By the 2 & 3 *Ed.* 6. *c.* 25. No county court shall be longer deferred than one month from court to court, so that the county court shall be kept every month, and not otherwise. When to be holden.

And this is to be accounted 28 days to the month, and not according to the month of the kalendar. 2 *Inst.* 71.

4. It may be kept at any place within the county, unless restrained by statute. *Wood* 832. Where to be kept.

5. The suitors, that is, the freeholders, are the judges in this court; except that in re-disseisin, by the statute of *Merton*, the sheriff is judge. And by the statutes concerning parliamentary elections, he is judge at the election of knights; for he must make a true return at his peril. *Barl. County Court.* How far the sheriff is judge.

6. This court shall hold pleas betwixt party and party, where the debt or damage is under 40*s.* 4 *Inst.* 266. Of what sum this court hath cognizance.

But in a *replevin*, the sum may be above 40*s.* 4 *Inst.* 266.

7. Also it hath not cognizance of trespass *vi & armis*, because a fine is thereby due to the king, which it cannot impose. 4 *Inst.* 266. Of what offences this court hath cognizance.

8. And by the 11 *H.* 7. *c.* 15. No plaint shall be entred in the county court, but where the plaintiff or his attorney is present; and the plaintiff shall find pledges to pursue his plaint; and he shall have but one plaint for one trespass or contract; on pain of 40*s.* half to the king, and half to the prosecutor. And one justice may examine the sheriff or other officer, making default; and shall, within a quarter of a year, certify the examination into the exchequer. One plaint for one trespass or contract.

But as to the pledges abovementioned, they are now disused in this court; and were formerly used only in cases where the plaintiff lived out of the county. *Greenw.* 11. *Read. County C.*

9. But by virtue of a writ of *justicies*, the court may hold plea of trespass *vi & armis*, and of any sum, or of all actions personal above 40*s.* For this writ is in the nature of a commission to the sheriff, and is *vicontiel*, that is, belongs to the sheriff, and is triable in the county court, and is not returnable. 4 *Inst.* 266. Writ of justicies.

10. By the 12 *G.* 2. *c.* 13. *s.* 7. If any person shall commence or defend any action, or sue out any writ, process, or summons, or carry on any proceedings in the county court, who shall not be admitted attorney or solicitor according to the act of 2 *G.* 2. *c.* 23. he shall forfeit 20 *l.* with costs, to him who shall sue in any court of record. Who shall act as attorney in this court.

Which said act of 2 G. 2. hath continuance by the 22 G. 2. c. 46. to *June* 24. 1757, *&c.*

Summons. 11. The plaintiff in this court first takes out a summons, returnable at the next county court; and if the defendant do not appear, an attachment or *distringas* is to be made out: but if the defendant appears, the plaintiff is to file his declaration, shewing his cause of action, or matter of complaint, in what manner the action accrued, at what time and place the wrong was done, and the damage he hath sustained. *Greenw.* 11. *Read. County C.*

Declaration. 12. If the defendant doth appear, and the next court after gives a rule to declare, and the plaintiff doth not file his declaration within the time, he may be nonsuited. *id.*

Continuance. 13. When the plaintiff hath declared, he must continue his suit from court day to court day, otherwise the defendant may take advantage of it; and this is called a continuance, being an adjourning of the suit from time to time, to keep it on foot. *id.*

Dies datus. 14. The rule, or *dies datus*, is when farther day is given to the plaintiff to declare, or to the defendant to plead; and the time given is usually to the next court day, but upon occasion may be inlarged. *id.*

Answer. 15. The next court after filing the declaration, and imparlance given, the defendant is to put in his answer or plea, and if the plaintiff join issue, they may proceed to trial the next court day, if they proceed not farther by replication, rejoinder, surrejonder, and the like. *id.*

Plea of freehold. 16. But if freehold is pleaded by the defendant, this court can proceed no further, for freehold shall never be tried without writ; therefore the cause must be removed: as when a defendant avoweth for damage feasant, and the plaintiff justifieth by reason of common of pasture. *Wood* 833.

Judgment and distress. 17. Where a verdict is given for the plaintiff, and judgment entred thereupon, a *fieri facias* may be awarded against the defendant's goods, which may be taken by virtue thereof, and appraised and sold, to satisfy the plaintiff; but if the defendant hath no goods whereupon to levy, the plaintiff remains without remedy in this court, for it being no court of record, no *capias* lies there; but an action may be brought at common law upon the judgment entred. *Greenw.* 22. *Read. County C.*

Removal by recordare. 18. Causes are removed out of this court, by a writ of *recordare*, which issues out of the chancery, directed to the sheriff, commanding him to send the plaint that is before him in his county court (without writ of *justicies*) into the court of king's bench, or common pleas, to the end the cause may be there determined. And the sheriff is hereupon to summon the other party to be in that court (into which the plaint is to be sent) at a day certain. And of all this he is to make a certificate under his own seal, and the seals of four suitors of the same court. *Read. County C.*

Removal by pone. 19. Causes are also removed by *pone*, which differs in nothing from a *recordare*, but that it removes such suits as are before the sheriff by writ of *justicies*, and a *recordare* is to remove the suit that is by plaint only, without writ. *id.*

20. And

20. And altho' the plea be discontinued in the county, yet the plaintiff or defendant may remove the plaint into the common pleas or king's bench, and it shall be good, and he shall declare upon the same. *id.* Removal after discontinuance.

21. In this court, after the *quinto exactus*, the coroner gives judgment of outlawry. 4 *Inst.* 266. Outlawry pronounced.

22. Out of the county court is derived the hundred court, for the ease of the subject; and it hath like jurisdiction as the county court, and may be held every three weeks. 2 *Inst.* 71. Hundred court.

County rate.

1. THE several rates hereafter following, in order to avoid the inconveniences of separate collections, shall for the future be levied and raised by one general county rate; Several rates thrown into one general county rate.

That is to say,

(1) For repairing county bridges, and highways thereto adjoining, and salaries for the surveyors of bridges; as directed by the 22 *H.* 8. *c.* 5. and 1 *An. st.* 1. *c.* 18.

(2) For building and repairing county gaols; by 11 & 12 *W.* *c.* 19.

(3) For the master of the house of correction his salary, and relieving the weak and sick in his custody; by the 7 *J.* *c.* 4.

(4) For relief of the prisoners in the king's bench and marshalsea prisons, and of poor hospitals in the county, and of those that shall sustain losses by fire, water, the sea, or other casualties, and other charitable purposes for relief of the poor; by the 43 *El.* *c.* 2.

(5) For relief of prisoners in the county gaol; by 14 *El.* *c.* 5.

(6) For setting prisoners on work; by the 19 *C.* 2. *c.* 4.

All which said six distinct rates (and that for vagrants by the 11 *An.* now repealed) are incorporated into one general county rate, by the 12 *G.* 2. *c.* 29. And by the said statute, and other subsequent statutes, these other following charges are likewise directed to be paid out of the said general county rate; to wit,

(7) The treasurer's salary; by the 12 *G.* 2. *c.* 29.

(8) Charges attending the removal of any the said general county rates by *certiorari*; by the 12 *G.* 2. *c.* 29.

(9) Money for purchasing lands at the ends of county bridges; by the 14 *G.* 2. *c.* 33.

(10) Charges of building or repairing houses of correction, and for fitting up and furnishing the same, and employing the persons sent thither; by the 17 *G.* 2. *c.* 5. *s.* 33.

(11) Charges of apprehending, conveying and maintaining rogues and vagabonds; by the 17 *G.* 2. *c.* 5.

(12) Charges of the soldiers carriages, over and above the officers pay for the same, by the several yearly acts against mutiny and desertion.

(13) The

(13) The coroner's fee of 9*d.* a mile for travelling to take an inquiſition, and 20*s.* for taking it; by the 25 *G.* 2. *c.* 29.

(14) Charges of carrying perſons to the gaol, or houſe of correction; by the 27 *G.* 2. *c.* 3.

(15) Charges of proſecuting and convicting felons; by the 25 *G.* 2. *c.* 36. and 27 *G.* 2. *c.* 3.

(16) Charges of proſecuting and convicting perſons plundering ſhipwrecked goods; by the 26 *G.* 2. *c.* 19.

To which may be added theſe following, by former ſtatutes; *viz.*

(17) By the 6 *G.* *c.* 23. The charges of tranſporting felons are directed to be paid by the treaſurer out of the county ſtock; which is now the ſame in effect, as to charge it upon the general county rate; ſince there can be no county ſtock in the treaſurer's hands but that.

(18) Charges of bringing inſolvent debtors to the aſſizes, in order to their diſcharge, if themſelves are not able to pay; by the 3 *G.* 2. *c.* 27.

(19) Charges of carrying pariſh apprentices, bound to the ſea ſervice, to the port to which the maſter belongeth; by the 2 & 3 *An.* *c.* 6.

Seſſions to lay the rate.

2. And that the ſame may be collected with as much eaſe, and as little expence as poſſible, the juſtices at their general or quarter ſeſſions, or the greater part of them, ſhall have power to make one general rate to anſwer all the purpoſes aforeſaid. 12 *G.* 2. *c.* 29. *ſ.* 1.

Which rate ſhall be aſſeſſed in ſuch proportions, in every pariſh or place, *as any of the rates by the ſaid ſeveral former acts have been uſually aſſeſſed.* id.

By which laſt words reference being made to the former acts, as to the manner of proportioning the rate, it is proper to inſert here, how the caſe ſtands upon the ſaid former acts, as to ſuch laying of the aſſeſſment; and it is thus:

(1) By the abovementioned act of the 22 *H.* 8. (in regard to *bridges*) the juſtices were to rate every inhabitant within their juriſdiction, in ſuch reaſonable ſum, as they ſhould think convenient. And by the 1 *An.* *ſt.* 1. *c.* 18. Every town, pariſh, or place was to be aſſeſſed, as they uſually had been aſſeſſed towards the repair of bridges.

(2) By the 14 *El.* *c.* 5. (for *relief of priſoners*) the juſtices were to rate every pariſh at ſuch reaſonable ſums as they ſhould think convenient.

(3) By the 43 *El.* *c.* 2. (for *hoſpitals and the marſhalſea*) the ſame was to be rateably aſſeſſed upon every pariſh.

(4) By the 7 *J.* *c.* 4. (for the *maſter of the houſe of correction his ſalary*) the ſame was to be rated, as for hoſpitals and the marſhalſea, by the 43 *El.* *c.* 2.

(5) By the 19 *C.* 2. *c.* 4. (for *ſetting priſoners on work*) to be raiſed as other county charges.

(6) By the 11 & 12 *W.* *c.* 19. (for *repairing gaols*) to be aſſeſſed by the juſtices in equal proportions, on every hundred, ward, or other diviſion.

(7) And

(7) And for *vagrants* (by the 12 *An.* now repealed) the money was to be raiſed as for bridges and gaols.

So that upon the whole, here ſeems to be intended an equal, proportionable rate, upon every diviſion.

3. And where any perſon, liberty, diviſion, or place hath uſually contributed, or is liable to pay, only to one or more of, and not to all the rates hereby intended to be raiſed, and thrown into one general rate; the juſtices at their general or quarter ſeſſions may order and aſcertain, what proportion thereof ſhall be aſſeſſed on, and paid by ſuch perſon, liberty, diviſion, or place. 12 *G.* 2. *c.* 29. *ſ.* 5. Places exempted from part of the rate.

As for inſtance, where by the ſtatute of 22 *H.* 8. *c.* 5. towns corporate are charged for the repairing of bridges within their reſpective liberties; and the counties, for the bridges out of ſuch liberties; in ſuch caſe, a town corporate ought not to be charged towards the bridges in the county at large; and conſequently ought to have an abatement in the rate charged upon them, in ſuch proportion as the expence of bridges is to the whole expence of the ſeveral articles charged upon the ſaid general county rate; as if the expence of bridges be a tenth part of the whole expence chargeable upon the county rate, then ſuch town corporate ſhall have an abatement of one ſhilling for every ten, which it would otherwiſe be charged with in ſuch rate.

4. And by the 13 *G.* 2. *c.* 18. *ſ.* 7. Where any liberties or franchiſes have commiſſions within themſelves, and are not ſubject to the county juſtices, and do not, nor did before the 12 *G.* 2. contribute to the county rates; the juſtices within ſuch liberties may exerciſe the ſame powers within their liberties, as juſtices in their counties. Places exempted from the whole rate.

5. Which ſaid rates the high conſtables ſhall, at ſuch times as the ſaid juſtices by their order in ſeſſions ſhall direct, demand of the churchwardens and overſeers; which demand ſhall be made in writing (A) and given to them, or any of them, or left at their dwelling houſes, or affixed on the church doors, by the ſaid high conſtables. 12 *G.* 2. *c.* 29. *ſ.* 2. High conſtable to make demand.

6. Whereupon the ſaid churchwardens and overſeers ſhall, in 30 days after ſuch demand made, out of the money collected for relief of the poor, pay the ſums ſo aſſeſſed on each pariſh or place. 12 *G.* 2. *c.* 29. *ſ.* 2. Overſeers to pay.

7. And if the churchwardens or overſeers, or any of them, ſhall neglect or refuſe ſo to pay, the high conſtable ſhall levy the ſame by diſtreſs and ſale of the goods of ſuch churchwardens or overſeers ſo refuſing or neglecting, by warrant of two or more juſtices reſiding in or near ſuch pariſh or place. 12 *G.* 2. *c.* 29. *ſ.* 2. To be levied by diſtreſs.

8. And the receipt of ſuch high conſtable ſhall be a full diſcharge to the churchwardens and overſeers, or other perſon paying the ſame. 12 *G.* 2. *c.* 29. *ſ.* 2. High conſtable's receipt.

9. Where there is no poor rate, the juſtices, in their general or quarter ſeſſions, ſhall by their order direct the ſum aſſeſſed on ſuch pariſh, townſhip, or place, to be rated and levied by the petty conſtable, or other peace officer, *as money for relief of the poor* Caſe where there is no poor rate.

poor is by law to be rated or levied: Which ſum ſo rated and levied ſhall be paid by him to the high conſtable, and ſhall be demanded of, paid by, or levied on ſuch petty conſtable, in the ſame manner as before of the churchwardens and overſeers. And if any petty conſtable ſhall pay ſuch ſum before he hath collected it, he may afterwards rate and levy the ſame, or may be allowed and reimburſed the ſame, out of any conſtable's or other rate, which the juſtices in their ſeſſions ſhall order and direct. 12 *G.* 2. *c.* 29. *ſ.* 3.

As money for relief of the poor is to be rated or levied] That is to ſay, by taxation of every inhabitant, parſon, vicar, and other, and of every occupier of lands, houſes, tithes, coal mines, or ſaleable underwoods. 43 *El. c.* 2. *ſ.* 1.

Northern counties.

10. And whereas it will be inconvenient to many towns, pariſhes, and places, in the counties of *York*, *Derby*, *Durham*, *Lancaſter*, *Cheſter*, *Weſtmorland*, *Cumberland*, and *Northumberland*, that the ſaid rates ſhould be paid out of the poor rate, the juſtices at their general or quarter ſeſſions, *if they ſhall think convenient*, may order the ſum aſſeſſed on any ſuch town, pariſh, or place, to be paid by and levied on the petty conſtable (B), in ſuch manner as is above directed, in caſes where no rate is made for the poor. 12 *G.* 2. *c.* 29. *ſ.* 4.

If they ſhall think convenient] By which words, the juſtices in thoſe counties may order the rate to be paid by either of the two methods before mentioned, according to their diſcretions; that is to ſay, either by the churchwardens and overſeers out of the poor rate; or by the petty conſtables by an aſſeſſment after the manner of the poor rate. And the reaſon of this clauſe ſeems to be, becauſe ſome pariſhes in the northern counties being very large, and for that reaſon ſubdivided into ſeveral townſhips with regard to the poor, it may happen that ſome townſhips in the ſame pariſh may be high rated, and others low rated, towards the relief of their poor; therefore if a general ſum for the county rate upon the whole pariſh, were to be charged upon all the inhabitants, in proportion to their poor rate, it would lay the burden very unequally. To remedy which, the juſtices by this clauſe may charge ſeparately ſuch ſum as they ſhall think reaſonable, upon each ſubdiviſion or conſtablewick, in order to lay the ſame equally throughout the pariſh: and if any townſhip ſhall be aggrieved thereby, they may appeal as hereafter is directed, or remove it by *certiorari*.

High conſtable to pay to the treaſurer.

11. The ſaid high conſtables, at or before the next ſeſſions reſpectively after they have received the money, ſhall pay the ſame to the treaſurer; and the money ſo paid, ſhall be deemed the publick ſtock. 12 *G.* 2. *c.* 29. *ſ.* 6.

Treaſurer's receipt.

12. And the treaſurer's receipt ſhall be a ſufficient diſcharge to the high conſtable. 12 *G.* 2. *c.* 29. *ſ.* 9.

High conſtable to account.

13. And the ſaid high conſtables ſhall deliver in a true account on oath (if required) of the money by them received, before the ſaid juſtices at their general or quarter ſeſſions: And if any ſuch high conſtable ſhall neglect or refuſe to demand or levy as aforeſaid,

ſaid, or to account, the ſaid juſtices at their general or quarter ſeſſions may commit him to the common gaol, until he ſhall have cauſed ſuch rates to be demanded and levied, and ſhall have rendred a true account. And if it ſhall appear by ſuch account, that any ſum is remaining in his hands, and he ſhall not pay over the ſame to the treaſurer, they may commit him till he pay the ſame. 12 *G.* 2. *c.* 29. *ſ.* 8.

Petty conſtables and others to account.

14. And the juſtices, at their general or quarter ſeſſions, may oblige by their order, the petty conſtables or any other perſon impowered to levy, collect, or receive any ſum for the purpoſes aforeſaid, and who have any ſum in their hands, to account and pay over the ſame, in like manner as the high conſtables. 12 *G.* 2. *c.* 29. *ſ.* 17.

Treaſurer's diſburſements.

15. And the treaſurer ſhall pay ſo much of the money in his hands, to ſuch perſons, as the juſtices in ſeſſions ſhall by their order from time to time appoint, for the uſes and purpoſes of the ſaid abovementioned acts, and for any other uſes and purpoſes to which the publick ſtock of any county, city, diviſion, or liberty, is or ſhall be applicable. 12 *G.* 2. *c.* 29. *ſ.* 6.

Treaſurer's account.

16. And the treaſurer ſhall keep a book of entries, of the ſums by him received and paid; and ſhall deliver in a true account on oath if required, of his receipts and diſburſements, to the juſtices at every general or quarter ſeſſions, and alſo the proper vouchers for the ſame, to be kept amongſt the records of the ſeſſions. 12 *G.* 2. *c.* 29. *ſ.* 7, 8.

Seſſions order a diſcharge to the treaſurer.

17. And the diſcharge of the ſaid juſtices, by their order at their general or quarter ſeſſions, ſhall be a ſufficient diſcharge to the treaſurer. 12 *G.* 2. *c.* 29. *ſ.* 9.

New rate when to be made.

18. And no new rate ſhall be made, until it appear, by the treaſurer's accounts, or otherwiſe, that three fourths of the money collected have been expended for the purpoſes aforeſaid. 12 *G.* 2. *c.* 29. *ſ.* 10.

Appeal.

19. If the churchwardens and overſeers of any pariſh or place, ſhall think ſuch pariſh or place is over rated, they may appeal to the next general or quarter ſeſſions, againſt ſuch part of the rate only as may affect ſuch pariſhes or places: but ſuch rate, upon the appeal, ſhall not be quaſhed in regard to any other pariſhes or places. 12 *G.* 2. *c.* 29. *ſ.* 12.

Certiorari.

20. No *certiorari* to remove any rates, or any orders or other proceedings of the ſeſſions touching ſuch rates, ſhall be granted but upon motion the firſt week of the next term after the time for appealing from ſuch rates or orders is expired; and on making it appear to the court by affidavit or otherwiſe, that the merits of the queſtion on ſuch appeal or orders, will by ſuch removal come properly in judgment. And no ſuch *certiorari* ſhall be allowed, until ſufficient ſecurity be given to the treaſurer, in the ſum of 100 *l.* to proſecute the *certiorari* with effect, and to pay the coſts if the rates or orders ſhall be confirmed. Nor ſhall any ſuch rates, orders, or proceedings be quaſhed for want of form only. 12 *G.* 2. *c.* 29. *ſ.* 21.

And no action ſhall be commenced againſt any perſon who ſhall have collected or received any money, or any rate which

ſhall

ſhall be quaſhed on a *certiorari*, or otherwiſe, for any money collected or received on ſuch rate before the *certiorari* was brought; but the perſons who have paid on ſuch rate more than they ought to have paid, ſhall be repaid, or have the ſame allowed in the next rate. 12 G. 2. *c.* 29. *ſ.* 18.

A. High conſtable's warrant to levy the rate.

Weſtmorland, Kendal ward. { To the churchwardens and overſeers of the poor of the townſhip [*or* pariſh] of ——— in the ſaid county.

BY *virtue of an order of his majeſty's juſtices of the peace in and for the ſaid county, in their general quarter ſeſſions aſſembled, you are hereby required in thirty days time from your receipt of this precept, or otherwiſe having had due notice thereof, to pay to me, out of the money by you collected or to be collected for the relief of the poor, the ſum of* ——— *being the proportion of your ſaid townſhip* [or *pariſh*] *for and towards the general county rate, for the repairing of bridges; repairing of the gaol, and for the relief of priſoners therein; and for the relief of the priſoners in the king's bench and marſhalſea priſons; repairing and furniſhing the houſe of correction, with the ſalary of the keeper thereof; the treaſurer's ſalary; the coroner's fees; the charges concerning vagrants, ſoldier carriages, convicting and tranſporting felons, and other county charges. And herein you are not to fail, on the peril that ſhall enſue thereof. Given under my hand at* Lathehead *in the ſaid county, the* ——— *day of* ———

Tho. Denniſon, *High conſtable.*

Or, in the northern counties abovementioned, the juſtices, if they think proper, inſtead of ordering the money to be paid by the churchwardens and overſeers, may order it to be paid by the petty conſtables: and then the high conſtable's precept to the petty conſtables may be thus:

Weſtmorland, Kendal ward. { To the conſtables of ——— in the ſaid county.

BY *virtue of an order from his majeſty's juſtices of the peace in and for the ſaid county, in their general quarter ſeſſions aſſembled, you are hereby required to raiſe the ſum of* ——— *within your conſtablewick, for which you are to make an equal rate within your ſaid conſtablewick, and to levy the ſame, in ſuch manner as money for the relief of the poor is by law to be rated or levied: which ſaid ſum you are to pay unto me, in thirty days time from your receipt of this precept, or otherwiſe having had due notice thereof; the ſame being the proportion of your ſaid conſtablewick, for and towards the general county rate, for the repairing of bridges.*

And

And so repeat the several particulars as in the last precedent; and that, for this reason, that the people may know what it is they pay their money for.

Court leet. See Leet.
Court of sessions. See Sessions.
Curriers. See Leather.

Customs.

THE laws relating to the customs, so far as justices of the peace, constables, and other such officers, are concerned therein, being considerably connected with the laws of excise, it is thought proper to refer this subject to the title Excise, where the whole will be more clearly comprehended under one view.

Custos rotulorum.

BY the 37 *H.* 8. *c.* 1. (which was altered by the 3 & 4 *Ed.* 6. *c.* 1. but restored by 1 *W.* *c.* 21.) No person shall be appointed to the office of *custos rotulorum*, but such as shall have a bill signed with the king's hand for the same; which bill signed shall be a sufficient warrant to the lord chancellor, to make a commission, assigning and authorizing thereby the same person to be *custos rotulorum*, until the king hath by another bill with his own hand appointed one other person to have the same office, by himself, or his sufficient deputy, learned in the laws, and meet and able to supply the said office.

In pursuance whereof, the last clause in the commission of the peace is generally to this effect: "Lastly, we have assigned you "the aforesaid ——— keeper of the rolls of our peace in our "said county, and therefore you shall cause to be brought before "you and your said fellows, at the days and places aforesaid, "the writs, precepts, processes, and indictments aforesaid, that "they may be inspected, and by a due course determined, as is "aforesaid."

Cutting out tongues. See Maim.
Cyder. See Excise.

Damage feasant. See Distress.

Debtors.

HOW prisoners for debt shall be demeaned. See title Gaol.

Insolvent debtors brought to the assizes, in order to be discharged, shall pay for their bringing thither, not exceeding 12 *d.* a mile; and if they are not able to pay, then the same shall be paid by the treasurer, out of the county stock. 3 *G.* 2. *c.* 27. *s.* 2.

The last insolvent act is that of the 28 *G.* 2. *c.* 13. for relief of persons imprisoned for debt, on or before *Jan.* 1. 1755. On which act no discharges are to be obtained after *Mar.* 31. 1757.

Deer. See Game.

Defamation. See Slander.

Demurrer.

A *Demurrer* (from *demorari*) signifies an *abiding* in point of law, upon which the defendant joins issue, allowing the fact to be true as laid in the indictment. *Wood* 1082.

In criminal cases not capital, if the defendant demur to an indictment, the court will not give judgment against him to answer over, but final judgment. 2 *Haw.* 334.

But regularly in all cases of felony, where a man pleads a special matter, tho' he conclude his plea with not guilty to the felony, or do not conclude it so, yet if his plea be tried, or found, or ruled against him, he shall be put to his plea of not guilty, and be tried for the felony; for tho' a man shall lose his land in some cases for mispleading, yet he shall not lose his life for mispleading. 2 *H. H.* 257.

Deodand.

1. DEODAND is, when any moveable thing inanimate, or beast animate, doth move to or cause the untimely death of any reasonable creature, by mischance, without the will or fault of himself, or of any person. 3 *Inst.* 57.

2. This,

Date Due

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